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IN THE

Supreme Court of the United States

October Term, 1983

No.

ORVIL T. BRASWELL and
PARLEE K. BRASWELL, et al., Petitioners,

v.

FLINTKOTE MINES LTD., et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Introductory Statement

Petitioners/Plaintiffs (fourteen in number) brought diversity product liability actions for asbestos-related diseases from asbestos exposure in their work place, against the manufacturer-suppliers. The cases below were disposed of by summary judgment in favor of defendants based on Indiana statutes of limitation after deciding, without clear precedent, when an action "accrues" in Indiana. The Court of Appeals for the Seventh Circuit affirmed the trial court 2-1, with a vigorous dissent.

QUESTIONS PRESENTED

1. Should this Court now require or encourage, in the interest of judicial economy, federal courts to remand controlling questions of state law to the appropriate state courts where such procedure is allowed by state law. Herein, did the Court of Appeals for the Seventh Circuit err by failing to certify the controlling question of Indiana law to the Indiana Supreme Court, when there was no Indiana law directly on point?

2. Should the United States Supreme Court certify to the Indiana Supreme Court the question: When does a products liability action against a manufacturer of asbestos for asbestosis caused by exposure to the manufacturer's product accrue under (1) Indiana's tort statute of limitations, Ind. Code Sec. 34-1-2-2, and (2) Indiana's products liability statute of limitations, Ind. Code Sec. 33-1-1.5-5?

3. Are Petitioners' rights to due process and equal protection, as guaranteed by the Fourteenth Amendment of the United States Constitution, violated by Indiana's applicable statute of repose? There is a division among the States and Federal courts on this question of federal constitutional law.

4. Did the Court of Appeals for the Seventh Circuit

erroneously interpret Indiana law regarding accrual of action date, erroneously creating new Indiana law thereby, and erroneously holding Petitioners' actions barred by the statute of limitations/repose?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioners/Plaintiffs below are individuals as follows:

Orvil T. Braswell and Parlee K. Braswell
William M. Baker and Phyllis J. Baker
Omer T. Rogers and Opal B. Rogers
Helen M. Igo and Boyd Melvin Igo
Robert E. Godfrey and Thelma Godfrey
James T. Clapp and Betty M. Clapp
Obert F. Moore and Gladys Moore

The Respondents/Defendants are all corporations, as follows:

Flintkote Mines, Ltd.
GAF Corporation
Raybestos-Manhatten, Inc.
The Celotex Corporation
Asbestos Corporation, Ltd.
Bell Asbestos Mines, Ltd.
National Gypsum Company
The Flintkote Company

INDEX

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	18
Appendix	
Opinion and Judgment of Court of Appeals	A-1
Order of Court of Appeals denying Petition for Rehearing	A-21
Tabulation of States with Certification Statute	A-22

TABLE OF AUTHORITIES

Page

I. Constitution:

Fourteenth Amendment to the Constitution of the United States 2

II. Cases:

Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874, 874 (Fla. 1980) 6

Bolick v. American Barmag Corp., 54 N.C.App. 589, 592-95, 284 S.E.2d 188, 191-92 (1981), modified and aff'd, 306 N.C. 364, 293 S.E.2d 415 (1982) .. 6

Borel v. Fibreboard Paper Products, 493 F.2d 1076 (5th Cir. 1973) cert. denied 419 U.S. 869 (1974) . 9

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 9

Dague v. Piper Aircraft Corp., 418 NE2d 207 (Ind. 1981) 5

Elkins v. Moreus, 98 S Ct. 1338, 1347 (1978) 5

Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983) 7

I.N.A. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980), cert. denied 102 S.Ct. 686 (1981) 9

Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) 9

Kennedy v. Cumberland Engineering Co., Inc., 471 A2d 195 (R.I. 1984) 6

Lankford v. Sullivan, Long & Hagerty, 416 So.2d 996, (Ala. 1982) 6

Leary v. U.S., 395 U.S. 6 (1969) 9

Martinez v. State of Cal., 100 S.Ct. 553, 444 US 277, 62 L Ed2d 481, reh. den. 100 S.Ct. 1285, 445 US 920, 63 L Ed 2d 606 11

Mathis v. Eli Lilly & Co., 719 Fed.2d 134 (6th Cir. 1983) 7

Monsanto v. Miller, 455 NE2d 392 (Ind.App. 1983) . 12

Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979) 6

Pitts v. Unarco Industries, Inc., 712 F2d276 (7th Cir. 1983) 7

Reed v. Reed, 404 U.S. 71 (1971) 8

Schelesinger v. Wisconsin, 270 U.S. 230 (1926) 9

Shideler v. Dwyer, 417 NE2d 281 (Ind. 1981) 5

United States v. Kubrick, 444 US 111 8

Urie v. Thompson, 337 U.S. 163 (1949) 8

Vlandis v. Kline, 412 U.S. 441 (1973)..... 9

III. Statutes:

Indiana Code 33-1-1.5-5 2
(Indiana Acts of 1978, Vol. II, P.L. 141, p. 1298)

Indiana Code 34-1-2-2 3

28 United States Code, Sec. 1254 (1) 2

IV. Other:

Alabama's Products Liability Statute of Repose, 11 Cum. L. Rev. 163, 180 (1980) 8

MacGill, R.D. "Note: Shideler v. Dwyer: The Beginning of Protective Legal Malpractice Actions", 14 Indiana Law Review 927 (1981)..... 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Orvil T. Braswell and Parlee K. Braswell, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 6, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto, and is reported as *Braswell v. Flintkote Mines, Ltd.*, 723 F2d 527 (1983). The United States District Court for the Southern District of Indiana entered separate findings of fact, conclusions of law and judgments on behalf of each defendant against each plaintiff and spouse below.

These comprise 266 pages and do not appear in the Appendix as the opinion of the Court of Appeals succinctly summarizes the issues.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 6, 1983. A timely Petition for Rehearing was denied on January 16, 1984, and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of the United States Supreme Court to review this decision is conferred by 28 U.S.C. Sec. 1254(1). 28 U.S.C. Sec. 2403(b) may be applicable. No court has certified to the Indiana Attorney General that the constitutionality of Ind. Code 33-1-1.5-5 was drawn in question.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of the equal protection of the laws."

Indiana Code 33-1-1.5-5 reads as follows:

> "Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues."

Indiana Code 34-1-2-2 reads as follows:

> "*Limitation of actions—Two, five, six, ten and twenty years.*—The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards:
>
> (1) For injuries to person or character, "for injuries to personal property, and for a forfeiture of penalty given by statute, within two (2) years."

STATEMENT OF THE CASE

The Court of Appeals' majority opinion aptly states the case: "This consolidated appeal involves seven plaintiffs who were employed by the World Bestos Division of the Firestone Tire and Rubber Company at its plant in New Castle, Indiana. Plaintiffs and their spouses have filed claims for damages based upon exposure to asbestos manufactured or supplied by the defendants. Each of the plaintiff-employees seeks damages for asbestosis, and their spouses claim lack of consortium. The workers were employed at jobs which exposed them to asbestos fiber in varying degrees and amounts over varying lengths of time. The first plaintiff to be exposed (Obert F. Moore) was initially exposed to the asbestos fibers in 1943, and no plaintiff was initially exposed later than 1964.

"The first of the seven diversity actions was commenced by Orvil T. Braswell on November 30, 1979, against the several defendants which allegedly furnished or manufactured asbestos for the World Bestos plant. Braswell was employed at the plant from 1950 until 1975, at which time his exposure to asbestos ceased. He apparently first noticed symptoms of his condition in 1972 and was informed by his physician in late 1979 that he had an asbestos-related disease.

"The other six actions were commenced by plaintiffs between January and July of 1981. Exposure to asbestos manufactured by at least one of the defendants with respect to these six plaintiffs ceased in the following years: 1963

(James T. Clapp), 1969 (Omer T. Rogers), 1974 (William M. Baker), 1979 (Helen M. Igo), 1979 (Robert E. Godfrey). Like Braswell, none of the other plaintiffs filed their complaints within two years of their most recent exposure to asbestos. The parties dispute at what time these plaintiffs were first cognizant of their conditions and, as to some plaintiffs, when they were first diagnosed by a physician to have an asbestos-related disease.

"The trial court in these consolidated actions granted summary judgment in favor of defendants on the ground that plaintiffs' actions were time-barred by Indiana statutes of limitations. Additionally, the court granted motions to dismiss for lack of in personam jurisdiction in favor of defendants Bell Asbestos Mines, Ltd. and Flintkote Mines, Ltd. The court also granted summary judgment in favor of Raybestos-Manhattan, Inc. on all product liability counts on the ground that the defendant was not engaged in the business of selling asbestos. Defendant Lake Asbestos of Quebec, Ltd. has settled with the plaintiffs during the pendency of this appeal."

REASONS FOR GRANTING THE WRIT

Briefly stated, Petitioners' actions are saved in part against the statute of limitations if actions accrue when the damage is "ascertainable", or "manifests itself", or under a "discovery rule". Petitioners' suits were brought within two years of any of these dates, by Petitioners' view of the evidence.

This case presents an opportunity for the Court to require or encourage the use of certification provisions most States now have to answer unclear questions of state law, thereby enhancing both judicial/litigant economy and certainty. The threshold question below was when did the Petitioners' cause "accrue" under Indiana law. Petitioners believe an action accrues when damage is ascertainable or discernible, and argued Indiana might adopt a discovery rule. Respondents argued accrual occurred at ingestion of

the asbestos fibers, or at termination of exposure at the latest. No Indiana case addresses the question clearly; the Indiana Supreme Court has neither accepted nor rejected the "discovery rule". The Court of Appeals' majority opinion acknowledged the lack of explicit ruling on the question, but still decided the crucial issue, relying upon *Shideler v. Dwyer*, 417 NE2d 281 (Ind. 1981). *Shideler v. Dwyer* was a legal malpractice case with a divided Indiana Supreme Court (3-2) and a strong dissent. It has been well criticized. MacGill, R.D., "Note: *Shideler v. Dwyer*: The Beginning of Protective Legal Malpractice Actions," 14 Indiana Law Review 927 (1981). The Court of Appeals made new Indiana law with its decision. Indiana has a certification procedure (Ind. Code 33-2-4-1; Ind. Rule App. Pro. 15 (O)), and has promptly responded to a previous request from the Court of Appeals. *Dague v. Piper Aircraft Corp.*, 418 NE2d 207 (Ind. 1981).

This Court has approved the certification procedure. As more states provide for certification, (see Appendix), certainty and economy for both litigant and court will be ultimately advanced by required usage. Petitioners ask the Court to use this case as the vehicle to require certification.

In *Elkins v. Moreau*, 98 S Ct. 1338, 1347 (1978), this Court certified a question of state law to the Court of Appeals of Maryland, reasoning Maryland had a great interest in the question and that the question affected many Maryland citizens. Here, Indiana is home to large numbers of persons injured by products whose damages do not usually manifest themselves for many years, i.e., asbestos, DES, Agent Orange, and a host of other latent disease causes which are growing to be known as "Toxic Torts". Indiana has a strong State interest in deciding whether or not these persons are compensated by the manufacturer, or supported through State paid social programs. Conversely, Indiana has a strong interest in providing a good business economic environment to retain or entice businesses within its borders, which business climate is invariably argued as

affected by decisions about limitation of actions. Thus, there is solid ground for this Court to certify the accrual question to the Indiana Supreme Court, under *Elkins v. Moreus*.

The "accrual" question need be answered to analyze the constitutional issues raised below. If Indiana actions accrue at either discovery or manifestation of damage, Petitioners' equal protection and due process complaints are narrowed to application of the repose provision in the statute of limitations as the statute would then provide some reasonable period of time for bringing a claim. Certification of the accrual question to the Indiana Supreme Court is appropriate and necessary if Indiana is to determine its own accrual dates.

Earlier herein Petitioners indicated their actions would be saved in part against the statute of limitation, having filed within two years of the time their asbestos disease manifested itself or was ascertainable or was discovered. But in June 1978, Indiana's Product Liability Act became effective, adding a "ten-year from initial date of delivery" repose provision to the two-year from accrual limitation. By limiting Petitioners' claims to asbestos exposure only in the last ten years, a full or effective remedy is denied.

The highest courts of five states have held similar product liability repose provisions unconstitutional, using equal protection and/or due process reasoning under provisions of their state Constitutions and the Fourteenth Amendment to the United States Contitution. See *Kennedy v. Cumberland Engineering Co., Inc.*, 471 A2d 195 (R.I. 1984); *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1003-04 (Ala. 1982) (ten-year statute void under Ala. Const. art. I, Sec. 13); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So.2d 874, 874 (Fla. 1980) (relying upon *Overland Const. Co., Inc. v. Sirmons*, 369 So.2d 572 (Fla. 1979) (twelve-year statute void under Fla. Const. art. I, Sec. 21); *Bolick v. American Barmag Corp.*, 54 N.C.App. 589, 592-95, 284 S.E.2d 188, 191-92 (1981), modified and aff'd, 306 N.C. 364,

293 S.E.2d 415 (1982) (six-year statute void under N.C. Const. art. I, Sec. 18); *Heath v. Sears, Roebuck & Co.*, 464 A2d 288 (N.H. 1983).

The Indiana statute was held constitutional by the Court of Appeals for the Seventh Circuit in this case and in *Pitts v. Unarco Industries, Inc.*, 712 F2d276 (7th Cir.1983, Cert. Den. 11/28/83) on due process and equal protection grounds. Accrual in *Pitts* was date of death, and at issue was the ten-year repose provision of the statute. Other federal courts have rejected challenges to ten-year repose provisions in similar legislation. See *Mathis v. Eli Lilly & Co.*, 719 Fed.2d 134 (6th Cir. 1983).

There is then a conflict between the states and Federal courts, with due process and equal protection being interpreted differently.

As the constitutional analysis often refers back to the purpose of the statute or the problem it addresses, the repose provision gives difficulty here. There is no legislative history to refer to in an attempt to understand the purpose of Indiana's repose provision. The Indiana Supreme Court, in holding it constitutional, did not perceive the commonly raised "product liability insurance crisis" as its purpose. *Dague v. Piper Aircraft Corp.*, supra. No help is found in a preamble or introduction to the statute—none exists. Indiana Acts of 1978, Vol. II, P.L. 141, p. 1298. Indiana had adopted strict liability by case law previously, and the statute codified this and added defenses. The purpose, by guestimate, is either to provide a liability cutoff after the reasonable life expectancy in a product, or to merely bring certainty to all product manufacturers—be they purveyors of potato salad whose life is counted in hours, or major equipment makers whose machines serve decades.

On Equal Protection analysis, the statute creates two classes of plaintiffs: those whose injury and manifestation of the injury is within ten (10) years of product delivery,

and, those, such as these Petitioners, whose injury occurred over the ten-year period after product delivery but which manifests many years later. In other words, slow injuries and fast injuries are treated unequally.

There is also made an unreasonable and arbitrary distinction among manufacturers, the protected class. Manufacturers and sellers of long-life and use products may be insulated from liability while manufacturers and sellers of short-life and use products are at risk. The statute makes the classification into which a manufacturer may fall a matter of chance, depriving some the protection granted others. *Reed v. Reed*, 404 U.S. 71 (1971). The statute likewise classifies all products alike.

Since a claim cannot reasonably be stale until some time after it accrues, the two-year from accrual portion of the statute prevents the filing of "stale claims". So the ten-year provision does not rationally serve any purpose other than setting an arbitrary product liability life. Thus it is well stated:

> "A manufacturer should be required to produce a product that can be safely used during the period of its intended use, not for some arbitrary period of time that is applied to all products. A statute that would take into account the period of the product's intended use would not favor some groups of manufacturers to the exclusion of others, nor would it be unfair to injured individuals." Comment, *Alabama's Products Liability Statute of Repose*, 11 Cum. L. Rev. 163, 180 (1980).

The classifications created by this statute are capricious, because the nature of the injury and not the fact of injury determines whether or not a suit will be permitted. *Urie v. Thompson*, 337 U.S. 163 (1949). Further, the statute of repose is arbitrary in its complete elimination of rights prior to the time the cause of action could reasonably have accrued. *United States v. Kubrick*, 444 US 111. Certainly, the protected class of manufacturers are not given equal

treatment or protection, and the consumers are treated differently from each other, depending upon chance.

On substantive Due Process grounds, the repose provision is proved unreasonable, arbitrary and capricious, and with means having no real and substantial relation to the object sought. It may be defective on due process grounds merely in its effect on the injured when compared with the fact that there is no demonstrable object sought by the legislation, leaving no balancing effect at all. As case law makes clear, asbestos-related diseases have a prolonged latent period between exposure and manifestation. See *I.N.A. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 686 (1981); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (8th Cir. 1975); and *Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied* 419 U.S. 869 (1974).

The ten-year period provided has no relationship to a fiber which never wears out and which slowly poisons an individual over a prolonged period of time. There is no basis for asserting, as the statute asserts in its application, that asbestos is rendered less toxic by the passage of time. Toxic chemicals and materials do not wear out.

As the repose provision creates a flat period of liability life, it violates substantive due process in the most fundamental sense. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). See also *Vlandis v. Kline*, 412 U.S. 441 (1973); *Leary v. U.S.*, 395 U.S. 6 (1969); and *Schelesinger v. Wisconsin*, 270 U.S. 230 (1926).

We respectfully urge the Court to carefully consider how arbitrary the ten-year limitation is when applied to the product whose damage usually is not manifested for twenty to forty years, as here. Where is a rational relationship between asbestos fibers, their useful life, or the period of time it takes for the damage they do to mature? The ten-year period is capricious to these workers who cannot and

do not know of even their injury, let alone its cause or their rights, until long after the cutoff.

Nor is setting a definite time limit for liability a permissible legislative goal when balanced on the scales of substantive due process and the rights of the injured in these and future cases of delayed harm product liability.

Petitioners believe substantive due process and equal protection require product repose statutes to be based on the useful and expected life of the product.

In upholding Indiana's ten-year repose provision, the Court of Appeals relied by rote upon an out of context quote on the policy of the law as expressed in *United States v. Kubrick*, 444 U.S. 111,117. No mention or discussion was made of the difference between a statute of limitations (X time from accrual) and statutes of repose, which tie liability exposure to no act or date relating to the injury.

The Court should accept this case and render an opinion on these issues for five reasons:

1. The large and quickly growing number of injuries caused by chemicals, drugs and other man-made substances, which injuries and/or diseases are not manifested for years longer than ever before in our history. Perhaps a natural consequence of the knowledge explosion since 1945. Toxic torts need to be addressed, beginning with constitutional fundamentals.

2. The constitutional guidelines for repose are in conflict between state and federal jurisdictions. As all courts wrestle with high technology induced litigation on hazardous waste, toxic torts, and other delayed damage settings, clear guidance on basic principals will help provide uniform justice, end forum shopping, and bring predictability and certainty to a new, growing and confused area of law.

3. The opinions of the Court of Appeals on this issue has been conclusionary and scant of analysis.

While counsel here runs the risk of complaining both that the food tasted bad and that there was not enough of it, there is a dearth of analysis. The full extent of Petitioners' arguments should not be forgotten with a mere statement that other courts have found similar statutes constitutional because the same arguments may not have been made at all. The Court of Appeals relied upon its previous decision in *Pitts v. Unarco Industries, Inc.*, 712 F2d 280, for the concept the court has no business instructing the Indiana Legislature as to who should bear the risk of loss. The real constitutional question of what parameters exist in substantive due process to limit the Indiana Legislature and application of those parameters to the facts at hand was not discussed. *Martinez v. State of Cal.*, 100 S.Ct. 553, 444 US 277, 62 L Ed2d 481, reh. den. 100 S.Ct. 1285, 445 US 920, 63 L Ed2d 606. Indiana's regulation of its tort law cannot be arbitrary or irrational. *Mathis v. Eli Lilly & Co.*, supra, did not discuss equal protection.

4. These Petitioners and many many others, have been denied an opportunity to bring their case on the merits to trial through no fault of their own, having had no way to know of their damage until long past their asbestos exposure. *United States v. Kubrick*, supra and *Urie v. Thompson*, supra, deserve to be raised to constitutional question status.

5. Lastly, the Court of Appeals decision and result is absurd, as aptly stated in the dissent. For example, the Court of Appeals opinion literally mandates lawyers to advise clients exposed to almost any possibly harmful substance to file suit and then delay the case as long as possible, awaiting the manifestation of damage. This approach to justice will clog the courts even further, and cause needless expense to defendants and claimants alike.

The Court of Appeals majority opinion was mistaken in its interpretation of when an action accrues in Indiana, as is well pointed out by the dissent. In fact, Indiana requires the damage to be ascertainable. Not the extent of damage, but the fact of damage. A proper statement of Indiana law, and showing how Indiana really interprets *Shideler v. Dwyer*, supra, is found in *Monsanto v. Miller*, 455 NE2d 392 (Ind. App. 1983), a product liability case:

> "Both Ind. Code 33-1-1.5-5 and Ind. Code 34-1-2-1 are accrual statutes; therefore, the date Miller's cause of action became ripe will determine which statute applies here. Both statutes begin to run when a complete cause of action has accrued or when a person becomes liable to an action. *Babson Bros. Co. v. Tipstar*, (1983) Ind. App., 446 N.E. 2d 11. A cause of action accrues when an injury, wrongfully inflicted, causes damage. *Scates v. State*, (1978) 178 Ind. App., 624, 383 N.E. 2d 491. It is not necessary that the extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. *Shideler, supra*. Failure to discover a right to bring suit does not operate to suspend the statute of limitations. *Fidelity and Casualty Company of New York v. Jasper Furniture Company*, (1917) 186 Ind. 566, 117 N.E. 258; *French v. Hickman Moving & Storage*, (1980) Ind. App., 400 N.E. 2d 1384. Likewise, no new cause of action will accrue when consequential damages arise from a prior injury and damage too slight to be noticed when inflicted. *City of North Vernon v. Voegler*, (1885) 103 Ind. 314, 2 N.E. 821; *Schmidt v. Merchants Dispatch Transp. Co.*, (1936) 270 N.Y. 287, 200 N.E. 824.

This issue is of course critical to the Petitioners' position. In the face of *United States v. Kubrick*, supra and *Urie v. Thompson*, supra, does substantive due process require opportunity for knowledge of injury to a claimant before his action accrues and the statute of limitations begins to run? If so, Indiana is arbitrary and irrational in the repose provision, and its failure to embrace the accrual at

discovery rule. Both through mistaken interpretation of Indiana law and constitutional analysis, the Court of Appeals was wrong, and Petitioners' causes of action dismissed as the result.

CONCLUSION

Justice requires that these seriously injured citizens, whose injuries were caused by exposure to asbestos many years ago, have the merits of their claims determined. They could not bring suit until their injuries were known, yet they did not know until after the statute of limitations had expired, according to the Seventh Circuit's interpretation of Indiana law. As Justice Swygert said "This result is a mockery of justice". The Court of last resort should not allow this result.

For all these reasons a Writ of Certiorari should be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

Page

Opinion and Judgment of Court of Appeals A-1

Order of Court of Appeals denying Petition for Rehearing A-21

Tabulation of States with Certification Statute A-22

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-2699, 82-2702, 82-2703, 82-2704, 82-2705, 82-2727, 82-2728, 82-2729, 82-2730, 82-2731, 82-2732 and 82-2733

ORVIL T. BRASWELL and PARLEE K. BRASWELL, et al.,

Plaintiffs-Appellants,

v.

FLINTKOTE MINES, LTD., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Nos. 79 C 996, 81 C 71, 306, 363, 722, 162 and 369
Cale J. Holder, *Judge.*

ARGUED SEPTEMBER 23, 1983—DECIDED DECEMBER 6, 1983

Before CUMMINGS, *Chief Judge*, SWYGERT and POSNER, *Circuit Judges.*

CUMMINGS, *Chief Judge.* This consolidated appeal involves seven plaintiffs who were employed by the World Bestos Division of the Firestone Tire and Rubber Company at its plant in New Castle, Indiana. Plaintiffs and their spouses have filed claims for damages based upon exposure to asbestos manufactured or supplied by the defendants. Each of the plaintiff-employees seeks damages for asbestosis, and their spouses claim lack of

consortium. The workers were employed at jobs which exposed them to asbestos fiber in varying degrees and amounts over varying lengths of time. The first plaintiff to be exposed (Obert F. Moore) was initially exposed to the asbestos fibers in 1943, and no plaintiff was initially exposed later than 1964.

The first of the seven diversity actions was commenced by Orvil T. Braswell on November 30, 1979, against the several defendants which allegedly furnished or manufactured asbestos for the World Bestos plant. Braswell was employed at the plant from 1950 until 1975, at which time his exposure to asbestos ceased. He apparently first noticed symptoms of his condition in 1972 and was informed by his physician in late 1979 that he had an asbestos-related disease.

The other six actions were commenced by plaintiffs between January and July of 1981. Exposure to asbestos manufactured by at least one of the defendants with respect to these six plaintiffs ceased in the following years: 1963 (James T. Clapp), 1969 (Omer T. Rogers), 1974 (William M. Baker), 1979 (Helen M. Igo), 1979 (Robert E. Godfrey). Like Braswell, none of the other plaintiffs filed their complaints within two years of their most recent exposure to asbestos.[1] The parties dispute at

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[1] Only plaintiffs Igo and Godfrey came close to filing within two years of their most recent exposure. Helen Igo filed on April 14, 1981; as the trial court found, shipments of asbestos from defendants Raybestos-Manhattan, Inc. and Asbestos Corporation, Ltd., which were the most recent shipments to the World Bestos plant, could not have contaminated Ms. Igo later than December 31, 1978, and April 13, 1979, respectively. (App. 125, 138). In regard to Robert Godfrey, who filed on July 2, 1981, the trial court found no contamination was possible from Raybestos-Manhattan asbestos after December 31, 1978, nor from Asbestos Corporation asbestos after July 1, 1979. (App. 164, 174). Plaintiffs do not challenge the accuracy of these trial court findings.

what time these plaintiffs were first cognizant of their conditions and, as to some plaintiffs, when they were first diagnosed by a physician to have an asbestos-related disease.

The trial court in these consolidated actions granted summary judgment in favor of defendants on the ground that plaintiffs' actions were time-barred by Indiana statutes of limitations. Additionally, the court granted motions to dismiss for lack of in personam jurisdiction in favor of defendants Bell Asbestos Mines, Ltd. and Flintkote Mines, Ltd. The court also granted summary judgment in favor of Raybestos-Manhattan, Inc. on all product liability counts on the ground that the defendant was not engaged in the business of selling asbestos. Defendant Lake Asbestos of Quebec, Ltd. has settled with the plaintiffs during the pendency of this appeal.

I

Plaintiffs argue that the statute of limitations in Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 (1981), violates plaintiffs' due process rights guaranteed by the Fourteenth Amendment. Section 33-1-1.5-5 states:

> Sec. 5. Statute of Limitations. This section applies to all persons regardless of minority or legal disability. Notwithstanding IC 34-1-2-5, any product liability action must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after the initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Thus § 33-1-1.5-5 provides for a two-year statute of limitations, limited by a ten-years-from-delivery clause.[2]

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[2] The Supreme Court of Indiana in *Dague* v. *Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981) reasonably interpreted the

(Footnote continued on following page)

As an initial matter, it should be noted that prior to June 1, 1978, the date of enactment of § 33-1-1.5-5, the Indiana statute of limitations applicable in these types of actions was Ind. Code § 34-1-2-2 (1976), which states that actions "[f]or injuries to person [shall be brought] within two years . . . ." Plaintiffs on appeal have not directly challenged the constitutionality of § 34-1-2-2, yet § 34-1-2-2 was invoked by the district court as the basis for granting summary judgment in favor of defendants on most claims. Under the district court's analysis, each plaintiff's cause of action accrued when the plaintiff was last exposed to asbestos from a particular manufacturer or supplier. Since five of the seven exposed plaintiffs were last exposed prior to June 1, 1978, the enactment date of § 33-1-1.5-5, the trial court reasonably concluded that Ind. Code § 34-1-2-2 should apply to these plaintiffs. Section 33-1-1.5-5 bars only those actions of two plaintiffs against defendants who supplied asbestos which contaminated those plaintiffs after June 1, 1978.[3] Since, as discussed *infra*, this Court concurs in the trial court's holding that accrual occurs no later than at the time of the most recent exposure, the constitutional challenge to § 33-1-1.5-5 alone does not impact most of the plaintiffs' claims herein for § 34-1-2-2 must also be considered.

Plaintiffs' contention that Ind. Code § 33-1-1.5-5 violates due process cannot be accepted. The policy behind statutes of limitations was recently articulated in *United States* v. *Kubrick*, 444 U.S. 111, 117, in which the constitu-

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[2] *continued*
ten-year clause to require that the action be brought within two years after it accrues, but in any event within ten years after the product is first delivered, unless the action accrues more than eight but less than ten years after delivery.

[3] The trial court also noted that, in regard to several defendants whose deliveries of asbestos ceased in the 1960's, the ten-years-from-delivery clause of § 33-1-1.5-5 would bar the actions if § 33-1-1.5-5 were to be applied.

tionality of a two-year federal statute of limitations was upheld:

> Statutes of limitations which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States* v. *Marion*, 404 U.S. 307, 322, n.14 (1971); *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428 (1965); *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945); *Missouri, K. & T. R. Co.* v. *Harriman*, 227 U.S. 657, 672 (1913); *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828).
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> Section 2401(b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell* v. *Haverhill*, 155 U.S. 610, 617 (1895); *Bell* v. *Morrison*, *supra*, 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938).

This Court finds Indiana's Product Liability Act, Ind. Code § 33-1-1.5-5 to be consistent with the above-stated policies which support statutes of limitations. This finding

echoes that in *Pitts* v. *Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983), in which this Court rejected a due process challenge to this very statute by a representative of an asbestosis victim. We discern no justifiable grounds upon which to disturb our prior holding. See also *Scalf* v. *Berkel, Inc.*, 448 N.E.2d 1201 (Ind. App. 1983) (Court of Appeals of Indiana finding that § 33-1-1.5-5 is rationally related to a legitimate state purpose).

The Sixth Circuit in *Mathis* v. *Eli Lilly & Co.*, No. 81-5803 (6th Cir. Oct. 7, 1983), held that a Tennessee statute of limitations that bars product liability actions brought more than ten years after the product was purchased does not violate due process, even though it may operate to extinguish some claims before injury actually becomes manifest. Similar to the ten-years-from delivery clause of Ind. Code § 33-1-1.5-5, the statute at issue in *Mathis*, Tenn. Code § 29-28-103 (1979) imposed with some exceptions a ten-year limit on bringing actions against manufacturers and sellers dating from the time the product was "first purchased for use . . . ."[4] The plaintiff sought damages for personal injury due to her in utero exposure to diethylstilbestoral (DES), a drug developed as a synthetic hormone to prevent miscarriages. Plaintiff alleged that her mother took DES in 1955, without knowledge that the drug might cause cancer in her offspring. Further, she alleged that she did not know she had developed cancer of the cervix until 1980. The trial court held that the action was barred by the Tennessee statute, and the Sixth Circuit affirmed, rejecting plain-

[4] Unlike the Indiana Legislature, the Tennessee Legislature specifically exempted actions resulting from exposure to asbestos from the ten-year limitation. Tenn. Code § 29-28-103(b) (1979). The Indiana Legislature could have enacted a similar exemption but did not; moreover, the Tennessee statute still applies to other actions based on injuries which develop long after initial exposure, including DES-related actions.

tiff's due process challenge. The Court recognized that there is a rational relationship between the Tennessee statute and the goals and purposes of the statute, including "the desire to encourage product manufacturers to provide goods without undue costs and risks, and to make product liability insurance more readily available . . . ." *Mathis* v. *Eli Lilly & Co.*, *supra*, slip op. at 10.

The reasonableness of statutes of limitations as applied in asbestosis claims was recognized by the Supreme Court of Indiana in *Bunker* v. *National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982). There the claimant argued the three-years-from-exposure statute of limitations for recovery of benefits under the Indiana Occupational Disease Act, Ind. Code § 22-3-7-9(e) (1974), violated due process. The court rejected the argument, noting that "considerable deference should be accorded the manner in which the Legislature has balanced the competing interests involved." *Bunker* v. *National Gypsum Co.*, 441 N.E.2d at 13. We are in accord with this view, and reject plaintiffs' due process argument.

II

Plaintiffs also contend that § 33-1-1.5-5 violates the equal protection clause of the Fourteenth Amendment. Plaintiffs focus upon the ten-year limitation provided by the statute, which requires that product liability actions be brought within ten years after the delivery of the product to the initial user or consumer. The crux of plaintiffs' argument is that the statute acts to create two classes of plaintiffs—those who discover their injury and bring an action within ten years of delivery, and those who do so after ten years and are thus time-barred—and that such a classification violates equal protection.

Plaintiffs' equal protection argument must also be rejected. In this action no fundamental right or suspect classification warranting strict scrutiny analysis has been identified; therefore the rational basis test is the proper one. See *Camille Corp.* v. *Phares*, 705 F.2d 223, 228 (7th Cir. 1983); *DiAntonio* v. *Northampton-Accomack*

Memorial, 628 F.2d 287, 291 (9th Cir. 1980). The objectives of § 33-1-1.5-5 are rational, as this Court commented in regard to this statute in *Pitts* v. *Unarco Industries, Inc.*, 712 F.2d at 280:

> The effect of this [statute] is to lessen the risk of loss—*i.e.*, from having to pay for injuries resulting from use of a defective product—manufacturers face when they place a product into a stream of commerce. That is a legitimate legislative purpose, and it is not the courts' business to instruct the Indiana legislature when it is better for consumers than producers to bear that risk.

Consistent with our decision in *Pitts* v. *Unarco Industries, Inc.*, *supra*, we hold that it is not a denial of equal protection to bar product liability actions brought later than ten years after the product was delivered to the initial user or consumer. See also *Scalf* v. *Berkel, Inc.*, *supra* (Court of Appeals of Indiana holding that the ten-years-from-delivery clause of § 33-1-1.5-5 does not violate equal protection).

III

Plaintiffs also contend that the district court improperly held that a cause of action for asbestosis accrues at the time of the most recent exposure to the asbestos fibers. Plaintiffs argue that a cause of action accrues not until there is ascertainable damage, and that generally this will be when the condition is diagnosed, unless it is shown that the plaintiff should have known of the injury at an earlier date. Although there is some dispute as to when some of the plaintiffs first became aware of their conditions, it is clear that at least some of the plaintiffs first learned of their asbestosis not earlier than late 1979. And all plaintiffs filed no later than July 2, 1981. Therefore, unless plaintiffs should have known more than two years prior to filing that they had asbestosis, under plaintiffs' interpretation of accrual the two-year rule found in § 33-1-1.5-5, as well as in § 34-1-2-2, would be satisfied as to some plaintiffs.

Plaintiffs' interpretation of the Indiana law of accrual, however, contradicts controlling precedent from the Supreme Court of Indiana. In *Shideler* v. *Dwyer*, 417 N.E.2d 281, 289 (Ind. 1981), that court held that a cause of action accrues "when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Shideler* was a malpractice case where the beneficiary of a provision in a will sued the attorney who drafted it because the provision was later declared invalid. The will was executed in October 1973, and the testator died in December 1973. The beneficiary did not receive payments due under the provision after November 1974. The provision was declared invalid on June 30, 1975 by the Probate Court, and the beneficiary sued the attorney on June 29, 1977. The attorney raised the two-year statute of limitations in Ind. Code § 34-1-2-2, contending that the cause of action accrued and the damage occurred when the testator died in 1973 and that the beneficiary's claim for malpractice was barred. The Supreme Court of Indiana agreed, holding that the damage occurred upon the testator's death, and that the statutory period of limitations began to run as of that date, and not on the date when the Probate Court declared the will's provision invalid. *Shideler* v. *Dwyer*, 417 N.E.2d at 290.

Thus the Supreme Court of Indiana rejected a "discovery" rule for the accrual of a cause of action, finding that, "[f]or a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damage be known or ascertainable but only that the damage has occurred." *Shideler* v. *Dwyer*, 417 N.E.2d at 289.

As this Court's duty is to apply Indiana law, we hold that the causes of action herein accrued not when the injuries were discovered or susceptible of ascertainment,[5]

[5] If we were free to write upon a clean slate, we might adopt the discovery rule whose adherents are growing. See *Neubauer* v. *Owens-Corning Fiberglas Corp.*, 686 F.2d 570 (7th Cir. 1982), certiorari denied, 103 S. Ct. 1233.

but rather at the time of the wrongful act, which the trial court reasonably concluded to be no later than the most recent exposure to asbestos fiber. Although Indiana courts have not explicitly held that the "wrongful act" or "impact" rule of accrual applies specifically in product liability actions against asbestos manufacturers, the *Shideler* court did cite with approval two New York decisions which applied such a rule in disease-related actions. In *Schwartz* v. *Heyden Newport Chemical Corp.*, 188 N.E.2d 142 (N.Y. 1963), amended on other grounds, 190 N.E.2d 253 (N.Y. 1963), certiorari denied, 374 U.S. 808, the plaintiff was injected with a radio-opaque dye which resulted in carcinoma thirteen years later. The New York Court of Appeals held that the plaintiff's claim accrued when the wrong occurred, *i.e.*, at the impact of injection, and not when the plaintiff discovered the injury. *Shideler, supra*, also cited with approval *Schmidt* v. *Merchants Dispatch Transportation Co.*, 200 N.E. 824 (N.Y. 1936), where it was held that the cause of action for a respiratory disease (pneumoconiosis) accrued when the plaintiff was exposed to the dust, not at the time when the dust so inhaled resulted in the disease, the latter date being estimable only by medical testimony.

Further, the Court of Appeals of Indiana has held that for purposes of the limitations period applicable under § 33-1-1.5-5, the action accrues not upon discovery, but rather at the time the plaintiff is harmed. *Wojcik* v. *Almase*, 451 N.E.2d 336, 341-42 (Ind. App. 1983). There a product liability action was brought against the manufacturer of a catheter, which is inserted in the chest to permit direct feeding of patients. The court held that since plaintiff filed more than two years after the harm occurred, *i.e.*, the breaking of the catheter within the patient, Ind. Code § 33-1-1.5-5 barred the action. See also *Monsanto Co.* v. *Miller*, No. 1-783 A 213 (Ind. App. Sept. 23, 1983) (rejecting the discovery rule).

The dissent seemingly overlooks the fact that the *Shideler* court invoked as primary support for its position and quoted at length decisions from other jurisdictions

which expressly reject the view that a cause of action does not accrue until the damage is susceptible of ascertainment. See *Schwartz* v. *Heyden Newport Chemical Corp.*; *Schmidt* v. *Merchants Dispatch Transportation Co.*, *supra*. As the Supreme Court of Indiana noted in regard to *Schmidt*, "the cause of action accrued when [plaintiff] inhaled the dust—more than three years before the action was commenced—not at the time when the dust so inhaled resulted in a disease of the lungs, which date could only be determined by medical testimony." *Shideler* v. *Dwyer*, 417 N.E.2d at 289. The *Shideler* court cited *Schmidt* for the rule of law that:

> The injury to the plaintiff was complete when the alleged negligence of the defendant caused the plaintiff to inhale the deleterious dust. For that injury, including all resulting damages, the defendant was then liable. The disease of the lungs was a consequence of that injury. Its result might be delayed, or, perhaps, even by good fortune averted; nevertheless, the disease resulted naturally, if not inevitably, from a condition created in the plaintiff's body through the defendant's alleged wrong. It cannot be doubted that the plaintiff might have begun an action against the defendant immediately after he inhaled the dust which caused the disease. No successful challenge could have been interposed on the ground that the action was prematurely brought because at the time it was commenced no serious damage to the plaintiff had yet developed. In that action the plaintiff could recover all damages which he could show had resulted or would result therefrom.

Shideler v. *Dwyer*, 417 N.E.2d at 290 (quoting *Schmidt* v. *Merchants Dispatch Transportation Co.*, 200 N.E. at 827). In light of the Supreme Court of Indiana's above-stated position, it is difficult to conceive that, as the dissent suggests, plaintiffs in the instant action would have been "laughed out of court" had they brought an action within two years of the time they were exposed to the asbestos fibers.

These decisions construing the meaning of the "accrual" of a cause of action indicate that under Indiana law the causes of action herein accrued when plaintiffs were last exposed to the asbestos. Since none of the actions herein were brought within two years of the most recent exposure, we hold that the district court was correct in concluding that the actions were barred by the two statutes of limitations considered herein.

Since our holding on the constitutional and accrual issues is dispositive of the case, it is unnecessary to address the other issues raised by plaintiffs on appeal.

Judgment affirmed.

SWYGERT, *Senior Circuit Judge*, dissenting. Plaintiffs in this case are persons (and their spouses) who contracted asbestosis after long-term exposure to raw asbestos fibres in their workplace. The usual manifestation period for asbestosis is twenty to thirty years. *See* Deposition of Anthony Dowell, M.D., at 138, *Braswell* Record. Thus, in many instances an employee will have retired from employment and will have ceased to be exposed to asbestos fibres before the disease manifests itself. This is what happened to plaintiffs in this case.

To state the obvious, if an asbestosis claimant brought an action against manufacturers of asbestos before any manifestion of the disease, the claimant would be "laughed out of court," *Martinez-Ferrer v. Richardson-Merrell, Inc.*, 105 Cal. App. 3d 316, 323, 164 Cal. Rptr. 591, 595 (1980). On the other hand, if the claimant waits for the disease to manifest itself, the claimant, under the court's holding today, may be barred from bringing a claim by Indiana's statute of limitations. This result is a mockery of justice.

In diversity actions such as this, the federal courts cannot and should not substitute their judgment for that of the state courts on matters of state law. I do not believe

that the Indiana Supreme Court has conclusively declared the result announced by the majority in this case. Particularly when the result is as unjust as it is here, this court has a duty to avoid creating state law if possible. Indiana's certification procedure should be used to give the Indiana Supreme Court an opportunity to decide an important point of Indiana law which directly affects the ability of Indiana residents to recover damages for debilitating injuries.

I disagree with the majority's finding that *Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981), the only case in which the Indiana Supreme Court has addressed the issue of a discovery rule, necessarily governs the present case. In *Shideler* the court held that a cause of action against an attorney for malpractice in drafting a will accrued when the testator died. The court rejected plaintiff's contention that the action did not accrue until the probate court found that the provision for plaintiff was void. *Shideler* can be distinguished from the present case on at least three grounds.

First, the court in *Shideler* expressly noted the possibility of adopting a different rule in a case in which "the misconduct was of a continuing nature or concealed . . . ." *Id.* at 291. In *Shideler*, the defendant's alleged negligence arose out of the single action of drafting the will and that negligence was at least *capable* of discovery any time after the contents of the will were disclosed, which necessarily occurred upon the death of the testator, if not before. *See also Wojcik v. Almase*, 451 N.E.2d 336, 342 (Ind. App. 1983) (action against manufacturer of catheter that broke off in plaintiff's body).* In this case, plaintiffs

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* A decision of the Indiana Court of Appeals, an intermediate appellate court, is not binding on this court, but is relevant data entitled to "proper regard." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Garris v. Schwartz*, 551 F.2d 156, 158 (7th Cir. 1977).

complain of continued exposure to asbestos, the injury from which is not even capable of discovery in many instances on the date of last exposure.

Second, the holding in *Shideler* was expressly based, in part, on the particular relationship between plaintiff and defendant in the case: "We see no unique relationship between a lawyer who drafts a will and one who is merely the object of his client's bounty that calls for a special rule. Without more, there is no continuing obligation to the devisee." 417 N.E.2d at 291. The court recognized that a discovery rule may have "special merit" in other cases. *Id.* The court could find a discovery rule warranted in the case before us. Indiana is among the large number of states that have recognized special rules of liability for manufacturers. *See Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 92-93, 300 N.E.2d 335, 339-40 (1973); Ind. Code §§ 33-1-1.5-1 to 33-1-1.5-8. These rules of stricter liability exist, in part, because manufacturers are particularly able to bear the costs of compensation for injuries from their products. Certainly "large scale" enterprises such as asbestos manufacturers are in a better position than lawyers and doctors to absorb such costs. *See Magrine v. Krasnica*, 94 N.J. Super. 228, ___, 227 A.2d 539, 545 (Cty. Ct. 1967), *aff'd sub nom. Magrine v. Spector*, 100 N.J. Super. 223, 241 A.2d 637 (App. Div. 1968), *aff'd*, 53 N.J. 259, 250 A.2d 129 (1969). Moreover, manufacturers of products such as asbestos are more likely to anticipate long-delayed injuries from their products than are lawyers and doctors from their services. *Cf. Raymond v. Eli Lilly & Co.*, 117 N.H. 164, ___, 371 A.2d 170, 176 (1977) (anticipation of long-delayed effects of drugs by drug manufacturers). For these reasons, the concern for repose, which the court stressed in *Shideler*, has much less appeal in claims against manufacturers than in claims against lawyers. *But see Wojcik v. Almase, supra*, 451 N.E.2d at 344 (rejecting discovery rule in claim against catheter manufacturer).

Third, some of the claims in this case, depending upon when they are deemed to have accrued, would be

governed by a different statute of limitations from the one applied in *Shideler*. Any actions that are deemed to have accrued after June 1, 1978 would be governed by Indiana's new products liability statute of limitations, Ind. Code § 33-1-1.5-5. *See id.* § 33-1-1.5-8(b). Under this statute, products liability actions must be brought within ten years from the date that the product was delivered to the initial user or consumer, *and* within two years from the date of accrual of the cause of action. If not brought within the ten-year outside limitation period, the action is time barred regardless of when it accrued. *See Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 210-11 (Ind. 1981). The action in *Shideler* was governed by Indiana's tort statute of limitations, Ind. Code § 34-1-2-2, which provides only a two-year accrual period. 417 N.E.2d at 288. The Indiana Supreme Court could reasonably find that the products liability statute's ten-year outside limitation period guarantees sufficient repose for manufacturers to permit the accrual period to be measured from the date of discovery of the injury. *But see Wojcik v. Almase, supra*, 451 N.E.2d at 341-42 (rejecting discovery rule in products liability action governed by Ind. Code § 33-1-1.5-5).

In sum, the Indiana Supreme Court might decline to apply a discovery rule in this case, but that result is not compelled by the court's holding in *Shideler*.

Most tort statutes of limitation were originally written and construed long before the advent of modern toxic diseases such as asbestosis. The California Court of Appeals, applying a discovery rule in a case involving an injury caused by the drug MER/29 that manifested itself sixteen years after the drug was last ingested, explained:

> The simple fact is that rules developed against the relatively unsophisticated backdrops of barroom brawls, intersection collisions and slips and falls lose some of their relevance in these days of miracle drugs with their wondrous, unintended, unanticipated and frequently long delayed side effects . . . . "[T]he response of the courts to advances in science and technology can be either to adhere rigidly to prior

doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs." (*Sindell v. Abbott Laboratories* (1980) 26 Cal. 3d 588, 610, 163 Cal. Rptr. 132, 144, 607 P.2d 924, 936.)

Martinez-Ferrer v. Richardson-Merrell, Inc., *supra*, 195 Cal. App. 2d at 324, 164 Cal. Rptr. at 595. These rules are similarly irrelevant in cases involving latent diseases from toxic substances. Thus, many courts, following the logic of the California courts, have adopted discovery rules in latent disease cases. *See, e.g., Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 166-71, 421 N.E.2d 864, 866-68 (1981); *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497, 501 (Ky. 1979); *Harig v. Johns-Manville Products Corp.*, 248 Md. 70, ___, 394 A.2d 299, 304-06 (1978) (questions certified to state court by district court); *Hutchison v. Semler*, 227 Ore. 437, 446, 361 P.2d 803, 807, 362 P.2d 704, 704 (1961) (silicosis from exposure to silica dust); *Coyne v. Porter-Hayden Co.*, 286 Pa. Super. 1, ___, 428 A.2d 208, 210 (1981).

Indiana's two-year accrual period for actions for personal injuries dates back to 1881. 1881 Ind. Acts (Spec. Sess.) ch. 38, § 38, p. 240. The Indiana courts have never construed its meaning in a claim involving a latent disease such as asbestosis. The Indiana Supreme Court should be given an opportunity to follow the equitable lead of other state courts and to construe its state statutes to meet the changing needs of a modern, technologically advanced society. I would certify to the Indiana Supreme Court, pursuant to Ind. Code § 33-2-4-1, the questions: When does a products libability action against a manufacturer of asbestos for asbestosis caused by exposure to the manufacturer's product accrue under (1) Indiana's tort statute of limitations, Ind. Code § 34-1-2-2, and (2) Indiana's products liability statute of limitations, Ind. Code § 33-1-1.5-5?

Even assuming that the rule announced in *Shideler* governs this case, the majority misapplied that rule here.

In *Shideler*, the court held that a cause of action accrues when the injury to plaintiff occurs. 417 N.E.2d at 289. Contrary to the finding of the New York Court of Appeals that the injury in an asbestosis case is the inhalation of the asbestos dust, *Schmidt v. Merchants Dispatch Transportation Co.*, 270 N.Y. 287, 300-01, 200 N.E. 824, 827 (1936),** the injury in such cases is the disease itself. *See*

** As the majority notes, the *Shideler* court quoted at length from this case and cited *Schwartz v. Heydon Newport Chemical Corp.*, 12 N.Y.2d 212, 216-17, 237 N.Y.S.2d 714, 717, 188 N.E.2d 142, 143-44 (1963), in which the New York Court of Appeals held that a cause of action to recover damages for cancer allegedly resulting from an injection of a radio-opaque dye accrued at the time the drug was injected rather than at the time the injury became apparent. I try to point out in this dissent other statements contained in the *Shideler* opinion and other decisions of the Indiana courts indicating that Indiana might not apply the New York rule in the present case despite this dictum in *Shideler*. I believe that the Indiana Supreme Court should be permitted to resolve these apparent conflicts. I should also note that even New York has moved away from its harsh rule in several instances. *See, e.g., Simcuski v. Saeli*, 44 N.Y.2d 442, 449, 406 N.Y.S.2d 259, 262, 377 N.E.2d 713, 716 (1978) (defendant estopped from raising statute of limitations as a defense to a tort action where defendant fraudulently concealed the tortious activity from plaintiff); *Flanagan v. Mount Eden General Hospital*, 24 N.Y.2d 427, 430-32, 301 N.Y.S.2d, 23, 26-27, 248 N.E.2d 871, 872-32 (1969) (adopting discovery rule in malpractice actions involving foreign objects left in patient's body); *Borgia v. City of New York*, 12 N.Y.2d 151, 155-56, 237 N.Y.S.2d 319, 321-22, 187 N.E.2d 777, 778-79 (1962) (statute of limitations for malpractice action stayed when course of treatment, which includes wrongful acts or omissions, has run continuously); N.Y. Civil Prac. Law § 214-b (1981 N.Y. Laws ch. 266, § 3) (enacting discovery rule for claims involving injuries from "Agent Orange"). *See generally Angie v. Johns-Manville Corp.*, 463 N.Y.S.2d 956, 957 (App. Div. 1983) ("a number of judicial decisions and legislative enactments designed to relieve to some degree the harshness of New York's general rule that a personal injury claim accrues at the time the injury or invasion of the body occurs, not at the time the injury was or could reasonably have been discovered").

Locke v. Johns-Manville Corp., 221 Va. 951, ___, 275 S.E.2d 900, 904-05 (1981); Vargo & Leibman, *Survey of Recent Developments in Indiana Law-Products Liability*, 12 Ind. L. Rev. 227, 253 n.184 (1979); *cf. Monsanto Co. v. Miller*, No. 1-783 A 213, slip op. at 5, 9-10 (Ind. App. Sept. 23, 1983) (injury from PCB in feed silo occurred and cause of action accrued under Indiana law when the level of PCBs in the herd's milk first reached an impermissible level, not when the contaminated silage was fed to plaintiff's herd); Ind. Code § 33-1-1.5-3 (products liability action requires "physical harm" to user or consumer). The date of inhalation of asbestos dust most closely corresponds to the date on which the lawyer in *Shideler* drafted the will; these were the points of time at which the defendants' last actions concerning or contacts with plaintiffs occurred. The court in *Shideler* expressly rejected the argument that the injury occurred and the cause of action accrued at this time. 417 N.E.2d at 290.

Under *Shideler*, plaintiffs' actions accrued when their asbestosis first "occurred." Although it may be difficult to determine when a progressive disease such as asbestosis first occurs, the date of last exposure is clearly irrelevant to that determination. *See Locke v. Johns-Manville Corp.*, *supra*, 275 S.E.2d at 905. Plaintiffs' asbestosis could have begun to develop any time before or after that date. Thus, even if *Shideler* is deemed to govern this case, the case must be remanded to the district court for determinations of the dates on which plaintiffs' injuries occurred. *See Monsanto Co. v. Miller*, *supra*, slip op. at 11 (remanded to district court for factual determination concerning when cause of action accrued).

Finally, I believe that the majority erred in failing to address the personal jurisdiction issue on appeal in this case. The district court held that it had no personal jurisdiction over defendants Flintkote Mines, Ltd. and Bell Asbestos Mines, Ltd. and dismissed plaintiffs' claims against these defendants. The district court held that the claims against Flintkote Mines, Ltd. were, in the alternative, time barred by Indiana's statute of limitations, but made

no alternative holding with respect to Bell Asbestos Mines, Ltd. The court made no findings of fact as to plaintiffs' last exposure to asbestos manufactured by Bell Asbestos. I believe that the court's jurisdictional holding was in error. In the absence of an alternative holding or findings of fact, the claim against Bell Asbestos must be remanded to the district court.

Indiana's long-arm statute, Ind. Trial Rule 4.4(A), subjects these defendants to the jurisdiction of the Indiana courts unless the exercise of jurisdiction would contravene the due process clause. *See Valdez v. Ford, Bacon and Davis, Texas, Inc.*, 62 F.R.D. 7, 14 (N.D. Ind. 1974); *Griese-Traylor Corp. v. Lemmons*, 424 N.E.2d 173, 180 (1981). The exercise of personal jurisdiction over these defendants raises no due process concerns.

This case is a far cry from *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), in which the Supreme Court held that an Oklahoma court could not exercise personal jurisdiction over a New York automobile distributor or dealer merely because it was foreseeable that plaintiff would drive his car into other states including Oklahoma. In this case, defendants knowingly transacted business on a continuous basis with Indiana companies and reaped the profits from these transactions.

In *Nelson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983), this court held that the Wisconsin courts had personal jurisdiction over a foreign manufacturer and distributor for injuries sustained in Wisconsin from one of their shirts. The manufacturer and distributor conducted all of their business in Hong Kong. The shirt in question was purchased from the distributor in Hong Kong by Woolworth, and placed in a Woolworth store in Wisconsin where it was ultimately bought by the mother of the injured child. The court refused to permit defendants to escape the jurisdiction of the Wisconsin courts by simply performing their sales transactions in a foreign jurisdiction. The manufacturer and distributor "were aware of the Woolworth distribution scheme and derived

economic benefit from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that [they] were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt that allegedly caused injury." *Id.* at 1127.

If the manufacturer and distributor in *Nelson* were subject to the jurisdiction of the Wisconsin courts, there can be no doubt that Flintkote Mines and Bell Asbestos are subject to the jurisdiction of the Indiana courts. They sold their products directly to Indiana companies, derived economic benefits from those sales, and must anticipate being haled into court in Indiana for injuries allegedly sustained there from their products.

For the foregoing reasons, I would certify the statute of limitations question to the Indiana Supreme Court, and would remand the claims against defendant Bell Asbestos Mines, Ltd. to the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 16, 1984.

Before

Hon. WALTER J. CUMMINS, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge*

ORVIL T. BRASWELL, et al.,	) Appeal from the United
	) States District Court for
Plaintiffs-Appellants,	) the Southern District of
	) Indiana, Indianapolis
Nos. 82-2699;	) Division.
82-2702 - 82-2705;	)
82-2727 - 82-2733.	) Nos. 79 C 996, 81 C 71,
	) 306, 363, 722,
vs.	) 162 and 369
	)
FLINTKOTE MINES, LTD., et al.,	) Cale J. Holder, Judge.
	)
Defendants-Appellees.	)

ORDER

On consideration of the petition for rehearing filed in the above-entitled caused by plaintiffs-appellants, a majority* of the judges of the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

*Judge Swygert voted to grant the petition for rehearing.

TABULATION OF STATES WITH CERTIFICATION STATUTE

Jurisdiction	Statutory Citation
Alabama	Ala. Const., art 6 Sec. 602.(b) Ala.R.App., P. 18
Colorado	Colo.App.R. 21.1
Florida	West's Fla.Stat. Ann. Sec. 25.031; Fla.App. R. 9.150
Georgia	Ga.Code Ann. Sec. 24-3902; Ga.Sup.Ct.R. 36
Hawaii	Haw.Rev.Sta. Sec. 602-5(2); Haw.Sup.Ct. R. 20
Indiana	Ind.Code Ann.1971, 33-2-4-1; Ind.App.R. 15(O)
Iowa	I.C.A. Secs. 684A.1 to 684.11
Kansas	K.S.A. Secs. 60-3201 to 60-3212
Kentucky	Rules of Civil Procedure, Rule 76.37
Louisiana	LA.SA-R.S. 13-72.1; La.Sup.Ct.R. 12
Maine	4 Me.Rev.Stat. Sec. 57; Me.R.Civ.P. 76B
Maryland	Code, Courts and Judicial Proceedings, Secs. 12-601 to 12-609
Massachusetts	Mass.Sup.Jud.Ct.R. 3.21
Minnesota	Minn.Stat.Ann. Sec. 480.061
Montana	Mont.Sup.Ct.R. 1
New Hampshire	N.H.Rev.Stat.Ann. 490; N.H.S.Ct.R. 21
New Mexico	N.M.Stat.Ann. Sec. 34-2-8
North Dakota	Rules of Appellate Proc., Rule 47
Oklahoma	20 Okla.Stat.Ann., Secs. 1601-1612
Puerto Rico	Supreme Court Rule 27 (4 L.P.R.A. App. I-A)
Rhode Island	R.I.Sup.Ct.R. 6
Washington	Wash.Rev.Code Ann. 2.60-010-2.60.900; Wash.R.App.P. 16.16
West Virginia	W.Va.Code, 51-1A-1 to 51-1A-12
Wisconsin	W.S.A. 821.01 to 821.12
Wyoming	Wyo.Stat. Secs. 1.193.1-1.193.4

Office - Supreme Court, U.S.
FILED
MAY 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1671

IN THE

Supreme Court of the United States

October Term, 1983

ORVIL T. BRASWELL AND PARLEE K. BRASWELL, ET AL.,
Petitioners,

v.

FLINTKOTE MINES, LTD., ET AL.,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

(I) Should the Petition for Certiorari be denied because Petitioners have failed to present any special or important reasons for review of the Seventh Circuit's decision below in *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983) (Plaintiffs' Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ["Petit."], Appendix pp. A1-A20)?

(II) Did the Courts below correctly decide the relevant Indiana law question by following the Indiana Supreme Court's decision in *Shideler v. Dwyer*, 418 N.E 2d 281 (Ind. 1981), to hold that Petitioners' causes of action for asbestosis accrued for purposes of Ind. Code Sec. 34-1-2-2 (Burns Code Ed., 1982 Supp.) ("IC") not later than when they were last exposed to asbestos, which in each case occurred over the statutory two years before suit was filed?

(III) Is certification appropriate (A) in view of this Court's prior ruling that it is never *required*? Further, (B) is certification appropriate here when (1) the Indiana law question presented is not novel; (2) the Indiana courts' answer to that question is neither unclear nor unsettled; and (3) Indiana law is neither distant nor unfamiliar to the Courts below? Further, is certification appropriate where, as here, (C) Petitioners chose the federal forum; (D) Petitioners' request for certification comes so late in this litigation that granting it will only cause unnecessary and unwarranted delay; (E) certification will not avoid any federal questions; and, (F) Indiana's interest in judicial economy weighs heavily against certification?

(IV) Have Petitioners' Fourteenth Amendment due process and equal protection rights been violated by Ind. Code Sec. 33-1-1.5-5 (West's Ann. Ind. Code Ed., 1983 Supp.) ("IC")—Indiana's ten-year product liability "statute of repose"—when (A) this Court has heretofore held that identical claims of Fourteenth Amendment violations do

not present a substantial federal question and has denied identical petitions for certiorari; (B) the Fourteenth Amendment does not require that personal injuries be ascertained or ascertainable before claims therefor can be barred as untimely by a state statute of limitations; (C) IC 33-1-1.5-5 rationally achieves Indiana's substantial and legitimate interests in repose and reliance; and (D) any classification created by that statute is not constitutionally impermissible but is rationally related to such Indiana policies?

(V) Does a conflict exist among the state and federal courts as to the resolution of Petitioners' claims of violations of Fourteenth Amendment due process and equal protection when all the state court cases cited by Petitioners, the only cases they cite as being contrary to the Seventh Circuit's decision below, decided only state constitutional questions?

LIST OF PARTIES

Pursuant to S.C. Rule 28.1, the parties to this proceeding are:

Orvil T. Braswell and Parlee K. Braswell,
William M. Baker and Phyllis J. Baker,
Omer T. Rogers and Opal T. Rogers,
Helen M. Igo and Boyd Melvin Igo,
Robert E. Godfrey and Thelma Godfrey,
James T. Clapp and Betty M. Clapp, and
Obert F. Moore and Gladys Moore,

Petitioners,

vs.

Flintkote Mines, Ltd., a corporation whose parent corporations are The Flintkote Company and Genstar, Inc.;

GAF Corporation, a corporation whose affiliate is GAF/Huls Chemie GmbH;

The Celotex Corporation, a corporation whose parent corporation is The Jim Walter Corporation;

Asbestos Corporation, Ltd., a corporation whose parent companies are Mines-SNA, Inc., and Societe Nationale de l'Amiante;

Bell Asbestos Mines, Ltd., a corporation whose parent corporation is Societe Nationale de l'Amiante;

National Gypsum Company, a corporation whose affiliate is Compagnie du Platre;

Raymark Industries, Inc., successor in interest to Raybestos-Manhattan, Inc. Raymark Industries, Inc., is a corporation whose parent corporation is Raymark Corporation; and

The Flintkote Company, a corporation whose parent corporation is Genstar, Inc.,

Respondents.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	1
ARGUMENT:	
I. Preliminary Statement: No Special or Important Reasons for Review	2
II. Indiana Law As To When A Cause of Action Accrues Correctly Applied By Seventh Circuit	3
III. Certification Inappropriate	7
A. Certification Never *Required*	7
B. Certification Improper Where, As Here, State Law Is Not Novel, Unsettled Or Distant	7
1. When A Cause of Action Accrues Under Indiana Law Is Not A Novel Question	8
2. No Unsettlement in Indiana Law as to When A Cause of Action Accrues	9
3. Indiana Law Is Not Distant to Judges Below	13
C. Certification Inappropriate Because Petitioners Chose This Forum	14
D. Certification Inappropriate Because the Petitioners' Request Is So Late That Granting It Will Only Cause Unwarranted Delay	15
E. Certification Will Not Avoid Federal Questions	15

F. Indiana's Interest in Judicial Economy Weighs Heavily Against Certification 16

IV. Petitioners' Fourteenth Amendment Due Process and Equal Protection Rights Are Not Violated by IC 33-1-1.5-5, Indiana's "Statute of Repose"..... 17

A. This Court Refused to Hear Appeals Raising Identical Claims of Constitutional Violations . 17

B. Fourteenth Amendment Does Not Require A Discovery Rule For Personal Injuries 20

C. IC 33-1-1.5-5 Rationally Achieves Indiana's Interests in Repose and Reliance 25

D. Any Classification Created by IC 33-1-1.5-5 Is Constitutionally Permissible 28

V. No Conflict Exists Among State and Federal Courts as to Any Federal Question..... 29

VI. Conclusion and Prayer 30

TABLE OF AUTHORITES

I. *Cases* Page

Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 (7th Cir. 1983) 14

Adair v. The Koppers Co., 541 F.Supp. 1120 (N.D. Ohio 1982)..... 22

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American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974) 23

Anderson v. Fred Wagner and Roy Anderson Jr., Inc., 402 So.2d 320 (Miss. 1981)..... 22

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Battila v. Allis Chalmers Mfg. Co., 392 So.2d 874 (Fla. 1980) 30

Beecher v. White, 447 N.E.2d 622 (Ind. App. 1983) . 2

Bishop v. Wood, 426 U.S. 341 (1976)..... 3,14

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Board of Commissioners of Wabash County vs. Pearson, 120 Ind. 426, 22 N.E. 134 (1889) ... 8

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Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983)..... *passim*

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Cantwell v. University of Massachusetts, 551 F.2d 879 (1st Cir. 1977) 13,14

Carmichael v. Silbert, 422 N.E. 2d 1330 (Ind.App. 1981), *transfer denied* 8,23

Carrow v. Streeter, 410 N.E.2d 1369 (Ind.App. 1980) 8

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Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 23

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Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981) 22

Dague v. Piper Aircraft Corp., 513 F.Supp. 19 (N.D. Ind. 1980), *aff'd* Case No. 79-C-293 (7th Cir. 1981) 29

Deer v. New York Central R.R. Co., 202 F.2d 625 (7th Cir. 1953) 8

Diamond v. Oreamuno, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969) 11

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 23

Elkins v. Moreno, 435 U.S. 637 (1978) 10,11,15

Ellerbe v. Otis Elevator Co., 618 S.W.2d 870 (Tex. Civ. App. 1981), *app. dismissed* ___ U.S. ___, 103 S. Ct. 24 (1982), *reh. denied* ___ U.S. ___, 103 S. Ct. 478 19,22

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Forth v. Forth, 409 N.E.2d 641 (Ind. App. 1980) . 8

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Gates Rubber Co. v. USM Corp., 508 F.2d 603 (7th Cir. 1975) 6

Good v. Christensen, 527 P.2d 223 (Utah 1974) ... 22

Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956) 8,9

Hargraves v. Brackett Stripping Machine Co., 317 F.Supp. 676 (E.D. Tenn. 1970) 26,28

Harmon v. Angus R. Jessup Assocs., Inc., 619 S.W.2d 522 (Tenn. 1981) 22

Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983) 30

Hinds v. McNair, 235 Ind. 34, 129 N.E.2d 553 (1955) 8

Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (1977), *cert. denied* 91 N.M. 3, 569 P.2d 413 22

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Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980) 7

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Johnson v. St. Vincent's Hospital, 404 N.E.2d 585 (Ind. 1980) 23

Johnson v. Star Machinery Co., 530 P.2d 53, (Ore. 1974) 26

Kennedy v. Cumberland Engineering Co., Ind., 471 A.2d 195 (R.I. 1984) 30

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Leary v. United States, 395 U.S. 6 (1969) 23

Lehman Brothers v. Schein, 416 U.S. 386 (1974) .. 7,8, 10,13,14,15

Long v. Anderson, 536 F.2d 739 (7th Cir. 1976) .. 14

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Mathis v. Eli Lilly & Co. 719 F.2d 134 (6th Cir. 1983) 29,30

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Meredith v. City of Winter Haven, 320 U.S. 228 (1943) 13,15

Merritt v. Economy Department Store, 125 Ind.App. 560, 128 N.E.2d 279 (1955) 8

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O'Brien v. Hazelet & Erdal, 410 Mich. 1, 299 N.W.2d 336 (1980) 22

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) .. 19

Overland Const. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979) 30

Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir. 1983), *cert. denied* ___ U.S. ___, 104 S.Ct. 509 17,18,20,22,27,29,30

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Railroad Comm. v. Pullman Co., 312 U.S. 496 (1941) 12

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Rosenberg v. Johns-Manville Sales Corp., ___ U.S. ___, 102 S. Ct. 2226 (1982), *aff'g Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (1981) 19,20

Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972) 22

Sakol v. Commissioner, 574 F.2d 694 (2d Cir. 1978), *cert. denied* 439 U.S. 859 (1979) 24

Salinero v. Pon, 124 Cal.App.3d 120, 177 Cal.Rptr. 204 (1981) 22

Scalf v. Berkel, Inc., 448 N.E.2d 1201 (Ind.App. 1983) 22,29

Schlesinger v. Wisconsin, 270 U.S. 230 (1926) 24

Schmidt v. Merchants Dispatch Transport Co., 270 N.Y. 287, 200 N.E. 824 (1936) .. 5,6,9,10,11,19,21

Schwartz v. Hayden Newport Chemical Corp., 188 N.E.2d 142 (N.Y. 1963), *amended on other grounds*, 190 N.E. 2d 253 (N.Y. 1963), *cert. denied* 374 U.S. 808 (1963) 4,6,10,11,19

Shideler v. Dwyer, 417 N.E.2d 281 (Ind. 1981) 3,4,5,6 7,8,9,10,11,14

Sims v. Lane, 411 F.2d 661 (7th Cir. 1969), *cert. denied* 396 U.S. 943 (1969) 14

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Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977) 14

State of Fla. ex rel. Shevin v. Exxon, 526 F.2d 266 (5th Cir. 1976) 13,15

Steinhardt v. Johns-Manville Corp., 54 N.Y.2d 1008, 446 N.Y.S. 2d 244, 430 N.E. 2d 1297 (1981), *appeals dismissed* and *cert. denied* ___ U.S. ___, 102 S. Ct. 2226 (1982). 10,19,20,23

Tolen v. A.H. Robins Co., Inc., 570 F. Supp. 1146 (N.D. Ind. 1983) 9

Toth v. Lenk, 330 N.E.2d 336 (Ind.App. 1975) ... 8

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United States v. Kubrick, 444 U.S. 111 (1979) 20,27,28

Urie v. Thompson, 337 U.S. 163 (1949) 9,20,26

Vinyard v. King, 655 F.2d 1016 (10th Cir. 1981) 12,14

Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980) 15

Vlandis v. Cline, 412 U.S. 441 (1973) 23,24

Volkswagenwerk, A.G. v. Watson, 390 N.E.2d 1082 (Ind.App. 1979) 15

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) . 23

Wisconsin v. Constantineau, 400 U.S. 441 (1972). 15

Wojcik v. Almase, 451 N.E.2d 336 (Ind.App. 1983) . 8

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II. *Constitutions, Statutes, and Rules of Court:*

ALA. CONST., Art. I, Sec. 13 30

FLA. CONST., Art. I, Sec. 21 30

Ind. Code Sec. 16-9.5-3-1 22

Ind. Code Sec. 22-3-7-9 (Burns Ed., 1982 Supp.) . 18

Ind. Code Sec. 33-1-1.5-5 (§34-4-20A-5 in Burns Ed., 1982 Supp.) ..... *passim*

Ind. Code Sec. 34-1-2-1 (Burns. Ed., 1973) 5,7

Ind. Code Sec. 34-1-2-2 (Burns Ed., 1982 Supp.)*passim*

IND. CONST., Art. I, §12 22

Ind. Trial R. 12(B)(6) 5

N.C. CONST., Art. I, Sec. 18 30

N.H. CONST., Pt. I, Arts. 14, 15 30

R.I. CONST., Art. I, Sec. 5 30

Supreme Court Rule 17.1 (28 *U.S.C.A.: Rules, 1983 Pocket Part)* 2,3,30

U.S. CONST. AMEND. XIV ..... *passim*

III. *Secondary Authorities:*

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H.C. Hinshaw & J.F. Murray, DISEASES OF THE CHEST (4th ed. 1980) 10

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STATEMENT OF THE CASE

Respondents accept Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

(I) No special or important reasons for review on writ of certiorari exist.

(II) The Courts below correctly applied Indiana law by holding that Petitioners' causes of action for asbestosis accrued under IC 34-1-2-2 not later than when they last inhaled asbestos, which in each case occurred over the statutory two years before suit was filed.

(III) Certification is inappropriate because (A) it is never *required* and (B) it is inappropriate in this case because (1) the Indiana law question presented is not novel, (2) the Indiana courts' answer to that question is neither unclear nor unsettled, and (3) Indiana law is neither distant nor unfamiliar to the Courts below. Certification is also improper because (C) Petitioners chose the federal forum, (D) Petitioners' request for certification is so late that granting it will cause unwarranted delay, (E) certification will not avoid federal questions, and (F) Indiana judicial economy weighs against certification.

(IV) Petitioners' due process and equal protection rights have not been violated by IC 33-1-1.5-5 because (A) this Court has refused to hear appeals raising identical claims of Fourteenth Amendment violations; (B) the Fourteenth Amendment does not require a discovery rule for personal injuries; (C) IC 33-1-1.5-5 rationally achieves Indiana's interests in repose and reliance, and (D) any classification created by it is constitutionally permissible.

(V) No conflict among the state and federal courts exists because Petitioners' state court cases decided only state constitutional issues.

ARGUMENT

I. Preliminary Statement: No Special or Important Reasons For Review.

The Petition does not present any "special [or] important reasons" [S.C. Rule 17.1 (28 U.S.C.A.: Rules, 1983 Pocket Part)] for review on certiorari of *Braswell v. Flintkote Mines, Ltd., supra*, (Petition, pp. ["Petit."] A1-A20).

Petitioners fail to show that "the character of [any of their stated] reasons" for granting the Writ are "special and important" to justify review under S.C. Rule 17.1. All of Petitioners' arguments, however designated, fall short of demonstrating any reason for review.

As to Rule 17.1 (a), the Seventh Circuit's application of Indiana law is not in conflict with any decision of another federal court of appeals or of the Indiana Supreme Court. See Argument, Section II, *infra*.

Erroneous is Petitioners' apparent argument under Rule 17.1(a), that, by failing to certify to the Indiana Supreme Court the question of when their causes of action "accrued" under IC 34-1-2-2, the Seventh Circuit "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's power of supervision."

Certification of the "accrual" question is wholly unnecessary and inappropriate. See Argument, Section III, *infra*. Thus, no ground for review under Rule 17.1(a) is stated.

Nor is review required by Rule 17.1(b): the decision of which review is sought was rendered by the Seventh Circuit, not by "a state court of last resort." Further, Petitioners' state court cases (Petit. 6-7) did not decide any relevant "federal questions[s]" [S.C. Rule 17.1(b)] at all. There is thus no division among the state and federal courts under 17-1(b). See Argument, Section V, *infra*.

This Court's decisions demonstrate Petitioners' inability

to bring their Petition within Rule 17.1(c). Any federal question presented has been effectively "settled by this Court." See Argument, Section IV, *infra*. The Seventh Circuit decided all federal questions in a way *not* "in conflict with applicable decisions of this Court."

II. Indiana Law As To When A Cause Of Action Accrues Correctly Applied By Seventh Circuit.

Examination of the application of *Shideler v. Dwyer*, *supra*, by the Courts below shows to be appropriate herein the deference accorded the local "federal judge of long experience and...three circuit judges whose circuit includes" Indiana on this purely Indiana law question.[1] Petitioners contend, however, that *Shideler* does not correctly state Indiana law but that the proper statement of Indiana law is in a decision of the Indiana Court of Appeals, *Monsanto Co. v. Miller*, 455 N.E.2d 392 (Ind.App. 1983). Petit. 12. Petitioners are wrong.

In the first place, if there were any conflict between *Shideler* and *Monsanto*, the former, as a decision of the Indiana Supreme Court, would obviously control. But no such conflict exists.

The Seventh Circuit held that under

> "Indiana law, ...the causes of action herein accrued not when the injuries were discovered or susceptible of ascertainment,* but rather at the time of the wrongful act, which the trial court reasonably concluded to be no later than the most recent exposure to asbestos fiber." *Braswell*, *supra*, 723 F.2d at 532 (footnote omitted).

The Seventh Circuit so held primarily because of the Indiana Supreme Court's decision in *Shideler*, especially the fact that the *Shideler* Court "invoked as primary

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[1] *MacGregor v. State Mut. Life Assur. Co.*, 315 U.S. 280, 281 (1942); *see also Bishop v. Wood*, 426 U.S. 341, 346 n. 10 (1977).

support for its position and quoted at length" *Schmidt v. Merchants Dispatch Transport. Co.*, 270 N.Y. 287, 200 N.E. 824 (1936), and *Schwartz v. Hayden Newport Chemical Corp.*, 188 N.E.2d 142 (N.Y. 1963), *amend. on other grounds*, 190 N.E.2d 253 (N.Y.), *cert. denied*, 374 U.S. 808. *Braswell, supra*, 723 F.2d at 533.

Schmidt held that where, as here, the alleged cause of plaintiff's injuries is a toxic (here asbestos) dust, "'the cause of action accrued when [plaintiff] inhaled the dust . . . not at the time the dust so inhaled resulted in a disease of the lungs, which date could only be determined by medical testimony.'" *Shideler, supra*, 417 N.E.2d at 289. That is what the Seventh Circuit held here. *Braswell, supra*, 723 F.2d at 533.

The *Shideler* Court held that,

> "[f]or a wrongful act to give rise to a cause of action and thus to commence the running of the statute of limitations, it is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred.' *Shideler, supra*, 417 N.E.2d at 289.

The Seventh Circuit's reading of Indiana law per *Shideler* is clearly correct. The Seventh Circuit thus correctly denied Petitioners' claim that *Monsanto* makes "susceptible of ascertainment" Indiana law. Indeed, the Court below correctly held that the Court of Appeals in *Monsanto* rejected the discovery rule. *Braswell, supra*, 723 F.2d at 532.

The sole issue in *Monsarto* was whether the trial court held erred in failing to grant defendant's Ind. Trial R. 12(B)(6) motion to dismiss, based on IC 33-1-1.5-5 and IC 34-1-2-1. *Monsanto, supra*, 455 N.E.2d at 394. The *Monsanto* Court held only that "a factual issue [existed as to accrual] which precluded the granting of such a motion." *Id.*, 455 N.E.2d at 398.

Here, in contrast, there is *no* factual issue as to when Petitioners' causes of action accrued. Their own doctor

testified that damage occurred when they inhaled Respondents' asbestos. See the September 20, 1982 Deposition Testimony of Anthony R. Dowell, M.D., at pp. 254-258, and 317, set forth at pp. A1-A5 of the Appendix hereof. Under *Shideler*, Petitioners' causes of action thus accrued when they inhaled the asbestos. *Id.*, 417 N.E.2d at 289. The two-year limitations periods then began to run. *Id.* There is *no* factual issue that this last occured in all cases more than two years before the filing of Petitioners' complaints. *Braswell, supra*, 723 F.2d at 528 n.1; Petit. 3-4. The Seventh Circuit thus correctly affirmed Respondents' summary judgments based on IC 34-1-2-2.

To support their contention that *Monsanto* contradicts *Shideler*, Petitioners quote from *Monsanto* as follows:

> "'It is not necessary that the extent of the damage be known or even ascertainable, but only that some ascertainable damage has occurred. *Shideler, supra.*'" Petit. 12, *quoting Monsanto, supra*, 455 N.E.2d at 394.

However, analysis of *Shideler* reveals that the *Monsanto* Court misquoted the Supreme Court by adding a requirement that "some" of the "damage" which "has occurred" be "ascertainable" whereas the Supreme Court only required that "damage" has occurred:

> "[I]t is not necessary that the extent of the damage be known or ascertainable but only that damage has occurred," *Shideler, supra*, 417 N.E.2d at 289.

The *Monsanto* Court thus added "ascertainable" to modify the word "damage" in its citation to *Shideler*. *Shideler* contains no such qualification. The requirement is only that damage has occurred. There is no requirement that such damage be ascertainable.[2]

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[2] The Seventh Circuit was also correct in holding that *Monsanto* represents no departure from *Shideler* because the *Monsanto* Court itself cited *Schmidt v. Merchants Dispatch Transport Co., supra*. *Monsanto, supra*, 455 N.E.2d at 394. It was partly the *Shideler* Court's heavy reliance upon *Schmidt* and *Schwartz* that guided the Seventh Circuit. *Braswell, supra*, 723 F.2d at 533.

That the Supreme Court in *Shideler* did *not* intend to require that damage be ascertainable as a prerequisite to accrual is shown by the dialogue between the majority and the dissent in *Shideler*. *Shideler* involved an attorney malpractice action brought by a frustrated beneficiary against the attorney who drafted a will. A clause in that will which made a bequest to the plaintiff was eventually declared void by a probate court.

At issue in *Shideler* was whether the cause of action accrued at the time of the testator's death, when the will became irrevocable, or at the time of the probate court's declaration that the bequest was void. The *Shideler* majority held that plaintiff's cause of action accrued when the testator died. The dissenters would have held that the claim accrued when the probate court invalidated the pertinent will provision, largely because "[i]n the instant case, plaintiff could *not* have known that the particular clause in the will was ineffective until the court determined that it was void." *Shideler*, *supra*, 417 N.E.2d at 296 (emphasis added).

Thus, the *Shideler* majority *knew* that the damage which it held had there occurred was *not* then "ascertainable" but nonetheless decided that the occurrence of such damage was sufficient for the cause of action to accrue.

The reason for that decision is clear enough. The *Shideler* Court was articulating a broad rule for when a cause of action accrues applicable not only to the facts of its case but to the wide variety of cases controlled by IC 34-1-2-2, IC 34-1-2-1 and the two-year portion of IC 33-1-1.5-5.

The *Shideler* Court was primarily concerned with Indiana's interest in "repose," i.e., "the interest in certainty and finality in the administration of our affairs, especially in commercial transactions, [that] makes it desirable to terminate contingent liabilities at specific points in time." *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975); *see also Chase Securities Corp. v. Donaldson*, 325

U.S.304, 314 (1945). As to that policy, a potential defendant's equities are the same, and the policy is just as beneficial to society, regardless of whether or not a plaintiff knows of or even *could know* of his damage. *Shideler, supra*, 417 N.E.2d at 291.

That policy of repose is served well by an accrual rule that makes the time of accrual *certain*, as in the date of last exposure. It is inhibited by a rule that makes the time of accrual dependent on the vagaries of medical testimony, as in the date a disease becomes susceptible of ascertainment. *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 574 n.2d (7th Cir. 1982); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1239-41 (6th Cir. 1980). Thus, the decisions in *Shideler* and in the courts below are compelled by the substantial Indiana interest in repose stated by the Indiana Supreme Court in *Shideler*.

III. Certification Inappropriate.

A. Certification Is Never Required.

Petitioners urge this Court to "require" lower federal courts to certify controlling questions of state law whenever possible. Petit. 4. However, this Court has held that it will make no such rule:

> "We do *not* suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory . . . . *Its use in a given case rests in the sound discretion of the federal court.*" *Lehman Brothers v. Schein*, 416 U.S. 386, 394-95 (1974) (emphasis supplied).

B. Certification Improper Where, As Here, State Law is Not Novel, Unsettled Or Distant.

In *Lehman Bros., supra*, "the first time [this Court] expressed its view as to the use of certification procedures by the federal courts," *id.*, 416 U.S. at 395 (Rehnquist, J., concurring), the Court articulated three circumstances which can justify certification:

> "Here resort to [certification] would seem particularly appropriate to view of [1] the novelty of the question and [2] the great unsettlement of Florida law, [3] Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves in this Court in matters of state law, as 'outsiders' lacking in the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein, supra*, 416 U.S. at 391.

None of the three conditions for certification found to exist in *Lehman Bros.* here exist. Certification is therefore inappropriate.

1. **When A Cause of Action Accrues Under Indiana Law Is Not A Novel Question.**

The question of when a cause of action for personal injuries accrues for Indiana statutes of limitations purposes is hardly novel. The principal Indiana decision relied upon by the Seventh Circuit, *Shideler v. Dwyer, supra*, is simply the most recent answer of the Indiana Supreme Court to that question. But *Shideler* is not the only such answer. *Shideler* is only one of at least thirteen Indiana appellate cases so holding.[3]

This oft-repeated Indiana rule, i.e., that "[a] cause of action...accrues when the injurious action occurs although the plaintiff may not learn of the injurious act

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[3] *See Guy v. Schuldt*, 236 Ind. 101, 138 N.E.2d 891, 895 (1956); *Hinds v. McNair*, 235 Ind. 34, 129 N.E.2d 553, 560 (1955); *Jackson v. Jackson*, 149 Ind. 238, 243, 47 N.E. 963, 964 (1898); *Board of Commissioners of Wabash County v. Pearson*, 120 Ind. 426, 22 N.E. 134 (1889); *Monsanto Co. v. Miller, supra; Wojcik v. Almase*, 451 N.E.2d 336, 341-42 (Ind.App. 1983); *Carrow v. Streeter*, 410 N.E.2d 1369, 1373 (Ind. App. 1980); *Fourth v. Fourth*, 409 N.E.2d 641, 644 n.5. (Ind.App. 1980); *Cordial v. Grimm*, 346 N.E.2d 266, 273 (Ind.App. 1976); *Toth v. Lenk*, 330 N.E.2d 336, 338 (Ind.Appl. 1975); *Blank v. Comm. Hospital of Indianapolis, Inc.*, 143 Ind.App. 333, 240 N.E.2d 562, 564 (1968); *Merritt v. Economy Department Store*, 125 Ind.App. 560, 128 N.E.2d 279, 280 (1955).

until later", *Guy v. Schuldt, supra*, 138 N.E. at 895, has been recognized by at least one District Court applying Indiana Law. *See Tolen v. A.H. Robins Co., Inc.*, 570 F.Supp. 1146, 1949 (N.D.Ind. 1983). The Indiana accrual rule has also been applied in at least two prior Seventh Circuit cases applying Indiana law. *See Morgan v. Koch*, 419 F.2d 993, 997 (7th Cir. 1969); *Deer v. New York Central Railroad Co.*, 202 F.2d 625 (7th Cir. 1953).

2. **No Unsettlement in Indiana Law As To When a Cause of Action Accrues.**

Nor is there any "great unsettlement" of Indiana law as to when a cause of action for personal injuries accrues. The Indiana Supreme Court's result and reasoning in *Shideler*, especially when considered with that Court's reliance upon and quotation from *Schmidt* and *Schwartz*, clearly required the Seventh Circuit's decision herein.

The *Shideler* Court flatly rejected Petitioners' argument that "Indiana requires the damage to be ascertainable." Petit. 12. That the Supreme Court did so is apparent not only from the dialogue between the majority and the dissent in *Shideler* described above, but also from that Court's considered rejection of this Court's application of a discovery rule to a federal statute of limitations in *Urie v. Thompson*, 337 U.S. 163 (1949). *Shideler, supra*, 417 N.E. 2d at 291.

What could be less "unsettled" law for this asbestosis case than the *Shideler* Court's invocation, "as primary support for its position" (*Braswell, supra*, 723 F.2d at 533), *Schmidt v. Merchants Dispatch Transport. Co., supra*, which the *Shideler* Court itself read as holding (*Shideler, supra*, 417 N.E.2d at 289) "that the cause of action accrued when [plaintiff] inhaled the dust"? That is precisely what the Seventh Circuit held here. *Braswell, supra*, 723 F.2d at 532.

Petitioners suggest that the accrual of claims for "injuries caused by chemicals, drugs and other man-made

substances, which injuries and/or diseases are not manifested for years" (Petit. 10) has not been addressed by Indiana courts. However, the two New York cases invoked as "primary support" by the *Shideler* Court were just such "[t]oxic tort" cases.

Schmidt involved silicosis, a type of pneumoconiosis caused by the inhalation of coal dust. Asbestosis, which plaintiffs allegedly have, is a form of pneumoconiosis caused by inhalation of asbestos dust. Both diseases thus share some common characteristics, including a relatively long "latency period" between the inhalation of the "deleterious dust" and the manifestation of any disease symptoms. *E.g.*, H.C. HINSHAW & J.F. MURRAY, DISEASES OF THE CHEST, Ch. 28, 707-09, 712-30 (4th ed. 1980); 1. A.P. FISHMAN, PULMONARY DISEASES AND DISORDERS, Ch. 65, 754-64, 770-79 (1980).

Schwartz v. Heyden Newport Chemical Corp., *supra*, relied upon in *Shideler*, was also a "disease-related action" in which "the plaintiff was injected with a radio-opaque dye which resulted in carcinoma thirteen years later." *Braswell*, *supra*, 723 F.2d at 532. In *Schwartz*, plaintiff's claim for his cancer was held barred by New York's statute of limitations, the Court holding, as it had in *Schmidt*, that "the plaintiff's claim accrued when the wrong occurred," i.e, when the dye was injected.

The "occurrence" rule of *Schmidt* and *Schwartz* has led the New York Court of Appeals to reach the same result in two consolidated asbestosis cases as the Seventh Circuit reached here. *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2226 (1982).

Thus, the cases at bar are nothing like *Elkins v. Moreno*, 435 U.S. 637 (1978), Petit. 5-6, or *Lehman Bros. v. Schein*, *supra*, because here the relevant State law is clear.

In *Lehman*, a New York district court dismissed consolidated shareholder derivative suits because it held

that plaintiffs' allegations that a corporate officer had breached his fiduciary duty to his corporate employer failed to state a claim under the controlling Florida law. The Second Circuit agreed with the District Court "that Florida law was controlling, [but] it found none that was decisive." *Id.*, 416 U.S. at 389.

The Second Circuit nonetheless reversed, holding that the Florida courts would go beyond not only existing Florida law but also beyond New York's rule of *Diamond v. Oreamuno*, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969), upon which the complaints were based, to find that a cause of action had been stated. However, *Diamond* established a doctrine that the Florida Supreme Court had not even adopted, let alone expanded. Such "unsettlement of [State] law" is clearly not the case here: the Indiana Supreme Court in *Shideler* (and numerous other cases) not only adopted an "occurrence" rule for when a cause of action accrues but clearly forecast how it would apply such a rule in a "toxic tort" case like this one by its heavy reliance upon *Schmidt* and *Schwartz*.

In *Elkins*, this Court certified a question of Maryland law to the Maryland Supreme Court to avoid unnecessarily deciding a federal constitutional question and also because "there are no controlling [Maryland] precedents...." *Elkins, supra*, 435 U.S. at 662. Moreover,

> "[n]o recent Maryland case [was] cited in the briefs [in this Court] or below. In addition, petitioner's counsel, an Assistant Attorney General of Mayland, stated at oral argument that there 'are no Maryland decisions one way or another.' [Tr. of Oral Arg.] at 10." *Elkins v. Moreno, supra*, 435 U.S. at 662 n.14.

This is clearly not the case here, as the Indiana Supreme Court's recent sanction of *Schmidt* in *Shideler* demonstrates.

Petitioners argue that Indiana law is unclear because the Indiana Supreme Court has not decided the accrual date of a cause of action *for asbestosis*. However, the absence of a

state supreme court decision involving precisely the same facts as are presented to the federal court does not warrant a finding by such federal court that the State law is "unsettled" or "unclear" where, as here, the State's applicable rule of law is itself clear.

In *Vinyard v. King*, 655 F.2d 1016 (10th Cir. 1981) (O'Connor, D.J.), the district court held that the controlling Oklahoma law was unclear as to whether plaintiff had a federally protected "property interest", and therefore abstained.[4] The Tenth Circuit reversed.

Stating that abstention is "premised" on an unsettled question of state law, then-Judge O'Connor rejected the proposition that Oklahoma case law gave "insufficient guidance" into Oklahoma law, stating that

> "...one cannot expect the courts to have considered each of the infinite factual situations that could possibly arise.* In short, the difficulty in determining whether plaintiff in the case before us has a property right in employment exists not because of an unclear *standard*,* but because the precise set of facts here posed has not been addressed by the Oklahoma Supreme Court. We do not in any way minimize how difficult it may be to apply the law to the facts, but abstention is inappropriate on this basis. Under such circumstances, the district court may not abdicate its duty to adjudicate the matter.***" *Id.*, 655 F.2d at 1019-20 (footnotes and citations omitted; emphasis added).

Vinyard is on point. Here, the "standard" is clear: a cause

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[4] Abstention in accordance with *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), is so closely akin to certification under applicable state law procedures that, aside from the relative convenience of certification, "there is no functional difference at the district court level between abstension and certification." 1A Moore, MOORE'S FEDERAL PRACTICE, ¶0.203[5], at 2150-51 (1983 revision). The same considerations which control the decision as to whether or not abstention is proper therefore apply to the decision of whether or not certification is appropriate. *Ibid.* at 2151.

of action accrues when the injurious action occurs, regardless of when the plaintiff learns that he has sustained damage as a result of that occurrence. That the Indiana Supreme Court has not applied that clear legal "standard" to "the precise set of facts" of an asbestosis case thus could not allow the District Court or the Seventh Circuit "to abdicate its duty to adjudicate the matter." *See also Meredith v. City of Winter Haven*, 320 U.S. 228, 236-37 (1943); 1A MOORE'S FEDERAL PRACTICE, *supra*, at 2151.

This is *especially* true where, as here, the *Shideler* Court unequivocally stated how that standard is to be applied to these facts by its approval of *Schmidt*, a case which *does* involve nearly the precise set of facts of the cases at bar. *See* Field, *Abstention in Constitutional Cases: The Scope of the Pullman Doctrine*, 122 U.PA.L.REV. 1071 (1974).

Persuasive also is *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976), in which certification was held to be inappropriate because there, as here, the relevant state rule of law was clear despite the absence of a factually identical state supreme court case.

Thus, for certification to be proper, the underlying state law must be unsettled or unclear. *Shideler* makes it clear that Indiana law is neither. Petitioners are not entitled to certification merely because they dislike existing Indiana law. *Meredith v. Winter Haven*, *supra*, 320 U.S. at 234; *Cantwell v. University of Massachusetts*, 551 F.2d 879, 880 (1st Cir. 1977).

3. Indiana Law Is Not Distant to Judges Below.

A third circumstance justifying certification in *Lehman* was the distance between the federal courts involved (there the District Court for the Southern District of New York and the Second Circuit) and the state whose law controlled (there Florida) and the consequent "lack [of] the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Brothers v. Schein*, *supra*, 416, U.S. at 95. Such is not here the case.

Here, the District Judge who initially decided the cases, the late Hon. Cale J. Holder, was appointed to the District Court for the Southern District of Indiana in 1954[5] and was on that bench continously to the time of his decisions in these cases in the fall of 1982. Such experience obviously gave Judge Holder substantial familiarity with Indiana law in general and with Indiana statutes of limitations in particular, as shown by his dialogue with counsel of record for Respondents at the Consolidated Pre-Trial Conference held on July 6, 1982. Appendix, pp. A6-A8.

Judge Holder was thus precisely the kind of District Judge who had a lot of experience with the relevant state law, and to whom this Court has for that reason consistently given great deference in the construction of such state's laws. *Bishop v. Wood*, *supra*, 426 U.S. at 346 n.10; *Huddleston v. Dwyer*, 322 U.S. 232, 236-37 (1944).

The Seventh Circuit has long included Indiana. The judges on the panel who decided this case have written numerous opinions requiring interpretation of Indiana law.[6]

C. Certification Inappropriate Because Petitioners Chose This Forum.

Plaintiffs commenced all of these actions in federal court. This fact weighs heavily against certification. *Cantwell v. University of Massachusetts*, *supra*, 551 F.2d at 880 ("[O]ne who chooses the federal courts in diversity cases is in a

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[5] JUDGES OF THE UNITED STATES, 514 (1978).

[6] As to Chief Judge Cummings, *see, e.g., Filler v. Rayex Corp.*, 435 F.2d 336, 337-38 (7th Cir. 1970); *Morgan v. Koch*, *supra*, 419 F.2d at 998-99 (7th Cir. 1969) (a case involving when a cause of action accrues); *Sims v. Lane*, 411 F.2d 661, 666 (7th Cir. 1969), *cert. den.* 396 U.S. 943 (1969). As to Judge Swygert, *see, e.g., Sparkman v. McFarlin*, 552 F.2d 172, 174-75 (7th Cir. 1977); *Long v. Anderson*, 536 F.2d 739, 740-42 (7th Cir. 1976). As to Judge Posner, *see, e.g., Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 967 (7th Cir. 1983); *Argonaut Ins. Co. v. Town of Cloverdale, Indiana*, 699 F.2d 147, 419-20 (7th Cir. 1983).

peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort."); *Venezia v. Miller Brewing Co.*, 626 F.2d 188, 192 n.5. (1st Cir. 1980); *Volkswagenwerk, A.G. v. Watson*, 390 N.E.2d 1082, 1085 (Ind.App. 1979) (Indiana "is reluctant to allow certification from a party who chooses to invoke federal jurisdiction....").

D. Certification Inappropriate Because Petitioners' Request Is So Late That Granting It Will Only Cause Unwarranted Delay.

Petitioners' first request for certification appeared in their "Appellants' Petition for Rehearing" to the Seventh Circuit, filed about December 23, 1983.

The first of these now-consolidated actions was filed in 1979. *Braswell, supra*, 723 F.2d at 528. Over four years later, the cases remain unresolved, even though the dispositive issue is ripe for decision. That alone is reason to refuse certification, as shown by this Court's reversal of the Fifth Circuit's abstention in *Meredith:*

> "To remit the parties to the state courts is to delay further the disposition of this litigation which has been pending for more than two years and which is now ready for decision." *Meredith, supra*, 320 U.S. at 237.

See also Wisconsin v. Constantineau, 400 U.S. 441 (1972) (Burger, C.J., dissenting); *State of Fla. ex rel. Shevin v. Exxon, supra*, 526 F.2d at 275-76 ("we must consider [in deciding whether certification is appropriate] an inevitable side effect of certification—delay....[D]elay that is not absolutely necessary should be avoided.")

E. Certification Will Not Avoid Federal Questions.

An important distinction between the instant cases and *Elkins v. Moreno, supra*, is that here no federal question will be avoided by certification.

The only federal issues asserted are whether the ten-year repose period in IC 33-1-1.5-5 violates Petitioners' Fourteenth Amendment due process and equal protection rights (Question Presented No. 3).[7] Such issues, *if* properly presented, are not dependent upon determination of when a cause of action accrues. Petit. 6. If the Court has jurisdiction of the Petition as to the constitutionality of IC 33-1-1.5-5, that issue remains regardless of when Petitioners' causes of action accrued.

Moreover, as the Seventh Circuit held, a holding which Petitioners have not challenged, "plaintiffs on appeal have not directly challenged the constitutionality of §34-1-2-2...." *Braswell, supra*, 723 F.2d at 529. Thus, no constitutional question will be avoided by the determination of when a cause of action accrues.

F. Indiana's Interest in Judicial Economy Weighs Heavily Against Certification.

Petitioners cite, as one reason for certification, "the interest of judicial economy...." Petit. i. But what of Indiana's judicial economy? Here, as shown above, certification is wholly unnecessary because the relevant State law is neither novel, unsettled nor distant. Certification is thus especially inappropriate since it "does increase the work loads of the state courts. Due regard [should be given] the interest of the states in conserving their judicial resources...." 1A MOORE'S FEDERAL PRACTICE, *supra*, at 2149-50.

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[7] The Petition for Certiorari is untimely as to the Fourteenth Amendment issues, as the Petition for Rehearing did *not* raise those issues. The Petition was not filed within ninety (90) days of the entry of judgment by the Seventh Circuit, but instead was filed within ninety days of the Seventh Circuit's denial of the Petition for Rehearing. Thus, the Petition for Certiorari was untimely under 28 U.S.C. 2101(c) as to any constitutional issues.

IV. Petitioners' Fourteenth Amendment Due Process and Equal Protection Rights Are Not Violated by IC 33-1-1.5-5, Indiana's "Statute of Repose."

Petitioners argue that their Fourteenth Amendment due process and equal protection rights are violated by Indiana's "statute of repose," IC 33-1-1.5-5. Petit. 7. This argument is without merit.

A. This Court Has Refused To Hear Appeals Raising Identical Claims of Fourteenth Amendment Violations.

Petitioners acknowledge that the same Fourteenth Amendment challenges they make to IC 33-1-1.5-5 were unsuccessfully made by the plaintiff in *Pitts v. Unarco Industries, Inc.*, 712 F.2d 276 (7th Cir. 1983), *cert. denied*, Dkt. No. 83-594, ___ U.S. ___, 104 S.Ct. 509 (November 28, 1983). The Court will recall that Petitioner Pitts argued in her Petition for a Writ of Certiorari, filed October 6, 1983, that IC 33-1-1.5-5's ten-year limitations period violated her Fourteenth Amendment due process and equal protection rights.[8] Thus, the Petition for Certiorari in *Pitts* presented this Court with the same federal constitutional issues as does the Petition here. The *Pitts* Petition was denied on November 28, 1983. *Pitts, supra*, 104 S.Ct. 509. No reason for a different disposition of Petitioners' Petition exists.

Two (2) recent dismissals of appeals in asbestos cases demonstrate that review should be denied. In *Bunker v. National Gypsum Co.*, Dkt. No. 82-1243, ___ U.S. ___, 103 S.Ct. 1761 (1983), this Court held that

> "The appeal is dismissed for want of a substantial federal question." *Ibid*, 103 S.Ct. at 1762.

In *Bunker, supra*, plaintiff-appellant Bunker appealed from the Indiana Supreme Court's decision in *Bunker v. National Gypsum Co.*, 441 N.E.2d 8 (Ind. 1982), which

[8] Counsel of record herein was counsel of record for Respondents in *Pitts, supra*, Dkt. No. 83-594.

reversed an earlier decision of the Indiana Court of Appeals, *Bunker v. National Gypsum Co.*, 426 N.E.2d 422 (Ind.App. 1981). The lower court in *Bunker* had held that IC 22-3-7-9(e) violated Bunkers' Fourteenth Amendment due process and equal protection rights. That statute of limitations provided that no compensation under the Indiana Workmen's Occupational Diseases Act would be paid for occupational diseases allegedly caused by the inhalation of asbestos unless the claim was filed "within three (3) years after the last day of the last exposure to" the asbestos. IC 22-3-7-9(e).

The Indiana Supreme Court held that:

> "We now find the statute of limitations provision of the Occupational Diseases Act to be constitutional in all respects." *Bunker v. National Gypsum Co., supra*, 441 N.E.2d at 14."

The Court will recall that appellant Bunker challenged the Indiana Supreme Court's decision on both federal due process and equal protection grounds, as Petitioners have here challenged IC 33-1-1.5-5 and as the Petitioner challenged IC 33-1-1.5-5 in *Pitts*.

The thrust of appellant Bunker's due process and equal protection challenges to IC 22-3-7-9(e) is identical to that of Petitioners' due process and equal protection challenges to IC 33-1-1.5-5 here and of Petitioner Pitts' challenges to IC 33-1-1.5-5 in *Pitts*. Their argument is that because "asbestos-related diseases have a prolonged latent period between exposure and manifestation,***" Petit. 9 (citations omitted), and because such period is assertedly "twenty to forty years", Petit. 9, the applicable limitations period [in IC 33-1-1.5-5, ten years; in IC 22-3-7-9(e), three years] violates federal due process because it prevents claimants with asbestos-related diseases from recovering damages when they "do not know of even their injury, let alone its cause or their rights, until long after the cutoff." Petit. 10. Such a statute of limitations allegedly violates federal

equal protection because "slow injuries and fast injuries are treated unequally." Petit. 8.

This Court rejected those contentions by dismissing the appeal in *Bunker* for want of a substantial federal question. Such a summary dismissal by this Court is a ruling on the merits in that it rejects the challenges to the *Bunker* decision presented by appellant Bunker in his statement of jurisdiction. *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959); *Chicago Sheraton Corp. v. Zaban*, 593 F.2d 808, 809 (7th Cir. 1979), *cert. denied*, 444 U.S. 911; *Ahern v. Murphy*, 457 F.3d 363, 364-65 (7th Cir. 1972).[9]

The second rejection of similar appeals by this Court in asbestos cases occurred in *Rosenberg v. Johns-Manville Sales Corp.*, Dkt. No. 81-1614, ___ U.S. ___, 102 S.Ct. 2226, (1982), and *Steinhardt v. Johns-Manville Corp.*, Dkt. No. 81-1615, ___ U.S. ___, 102 S.Ct. 2226 (1982).

In *Steinhardt* and *Rosenberg*, the New York Court of Appeals affirmed summary judgments granted defendant asbestos manufacturers based on the New York statute of limitations which, under pre-existing New York case law there reaffirmed (i.e., *Schmidt* and *Schwartz*), was held to commence to run when the plaintiffs were last exposed. *Steinhardt v. Johns-Manville Corp., supra.*

It is true that this Court "[t]reated the papers whereon the appeals were taken as petitions for writ of certiorari", and then "denied" "certiorari" in *Rosenberg, supra*, 102 S.Ct. at 2226, and *Steinhardt, supra*, 102 S.Ct. at 2227, instead of dismissing the appeals "for want of a substantial

[9] This Court's dismissal of the appeal for want of a substantial federal question in *Ellerbe v. Otis Elevator Co.*, 618 S.W.2d 870 (Tex. Cir.App. 1981), *app. dismissed*, ___ U.S. ___, 103 S.Ct. 24 (1982), *reh. den.*, ___ U.S. ___, 103 S.Ct. 478, is similarly significant. There the Texas architects and engineers' "statute or repose" was upheld against federal due process and equal protection challenges. An architects and engineers' statute of repose shares with a product liability statute of repose the same alleged violations of due process and equal protection, i.e., it can bar a plaintiff's claim for injuries before the plaintiff knows or can know he is injured.

federal question" as it did in *Bunker, supra*. It is also true that this Court simply denied Pitts' Petition for Writ of Certiorari. *Pitts v. Unarco Industries, Inc., supra*, 104 S.Ct. at 509. However, the result in all three cases is the same as in *Bunker*.

Each of the four decisions left intact a decision which held that the summary dismissal of an asbestosis claim did not violate the Fourteenth Amendment. Each such dismissal occurred because the claim was filed after expiration of the applicable State limitations period, even though each such limitations period was, by Petitioners' argument, shorter than the "prolonged latent period between initial exposure to asbestos and manifestation." Petit. 9.

Thus, the clear import of this Court's dismissal of the appeal in *Bunker*, and its denials of the petitions for certiorari in *Pitts*, *Rosenberg* and *Steinhardt*, is that certiorari should be here denied because the Seventh Circuit in *Braswell* did *not* decide a federal question contrary to any decisions of this Court.

B. **Fourteenth Amendment Does Not Require A Discovery Rule For Personal Injuries.**

Petitioners cite *United States v. Kubrick*, 444 U.S. 111 (1979), and *Urie v. Thompson, supra*. Petit. 10-11. Petitioners recognize that in neither case did this Court hold that the Fourteenth Amendment required a state tort statute of limitations to have a discovery rule. Instead, Petitioners argue that the discovery rule applied by this Court to the federal statutes of limitations in those cases should be "raised" by this Court to become a Fourteenth Amendment rule. Their argument is without merit.

It is clearly not now the law that the Fourteenth Amendment requires a discovery rule:

> "Nor is a discovery rule mandated apparently by various provisions of the federal Constitution. See *Steinhardt v. Johns-Manville Corp.*, 54 N.Y.2d 1008,

446 N.Y.S2d 244, 430 N.E.2d 1297 (Ct. App. 1981), ___ U.S. ___, 102 S.Ct. 226, 73 L.Ed.2d ___." *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 575 n. 4 (7th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 1233 (1983).

To change the law so as to require a discovery rule in every state tort statute of limitations as a matter of federal constitutional law would be contrary to proper concepts of federalism:

> "[T]he State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980).

If the Fourteenth Amendment requires a discovery rule—a rule that a plaintiff's personal injuries must be ascertained or ascertainable before his claim therefore can be barred as untimely—*many* states will have to rewrite many statutes which establish periods of "ultimate repose." Such statutes exist not only as to product liability claims but also as to claims for malpractice by architects, engineers and/or doctors. The concept of all such statutes is the same: a period of "ultimate repose" is established which begins to run from a date certain over which only the potential defendant has control, e.g., the date of delivery of the product to the initial user or consumer, the date of substantial completion of a building or the date of the doctor's last treatment. Any claim based upon an injury that occurred more than the number of years of the applicable repose period after that date certain is barred, regardless of when the injury occurs or whether the plaintiff knows or can know he is injured.

A large number of such state laws which have already withstood constitutional challenges would be invalidated

by a holding that the Fourteenth Amendment requires a discovery rule.[10]

Indiana has itself upheld IC 33-1-1.5-5 against a constitutional challenge based on IND. CONST., art. I, sec. 12, which is patterned after the Fourteenth Amendment's due process clause, *Dague v. Piper Aircraft Corporation*, 418 N.E.2d 207 (Ind. 1981), and against federal due process and equal protection challenges. *Scalf v. Berkel, Inc.*, 448 N.E.2d 1201 (Ind.App. 1983).

Similarly, IC 16-9.5-3-1, which provides that a medical malpractice claim must be filed within two years of the al-

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[10] Reported cases in which such architects' and engineers' special statutes of repose have been upheld against federal due process and equal protection challenges include an Indiana case, *Beecher v. White*, 447 N.E.2d 622 (Ind.App. 1983), as well as the following: *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557 (D.Md. 1980), *aff'd in part, dismissed in part*, 660 F.2d 91; *Adair v. Koppers Company of Inc.*, 541 F.Supp. 1120 (N.D.Ohio 1982); *Smith v. Allen-Bradley Company*, 371 F.Supp. 698 (W.D.Va. 1974); *Barnhouse v. City of Pinole*, 133 Cal.App.3d 171, 183 Cal.Rptr. 881 (1982); *Salinero v. Pon*, 124 Cal.App.3d 120, 177 Cal.Rptr. 204 (1981); *Yarbro v. Hilton Hotels Corporation*, Colo., 655 P.2d 822 (1982); *Twin Falls Clinic & Hospital Building Corporation v. Hammill*, 103 Idaho 19, 644 P.2d 341 (1982); *Burmaster v. Gravity Drainage District No. 2 of Parish of St. Charles*, La., 366 So.2d 1381 (1978); *Klein v. Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982); *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980); *Anderson v. Fred Wagner and Roy Anderson Jr., Incorporated*, Miss., 402 So.2d 320 (1981); *Reeves v. Ille Electric Company*, 170 Mont. 104 551 P.2d 647 (1976); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A.2d 662 (1972); *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (1977), *cert. den.* (1977), 91 N.W. 3, 569 P.2d 413; *Lamb v. Wedgewood South Corporation*, 55 N.C.App. 686, 286 S.E.2d 876 (1982), *mod.*, 302 S.E.2d 868 (N.C. 1983); *Freezer Storage, Inc., v. Armstrong Cork Company*, 476 Pa. 270, 382 A.2d 715 (1978); *McMacken v. State*, S.D.320, N.W.2d 131, on rehearing, (1982) 325 N.W.2d 60 (1982); *Harmon v. Angus R. Jessup Associates, Inc.*, Tenn., 619 S.W.2d 522 (1981); *Ellerbe v. Otis Elevator Company*, *supra*; *Good v. Christensen*, Utah, 527 P.2d 223 (1974); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 503 P.2d 108 (1972).

leged negligent act, regardless of the plaintiff's knowledge thereof, has been upheld against federal and Indiana due process and equal protection challenges. *Rohrbaugh v. Wagoner*, 413 N.E.2d 891 (Ind. 1980); *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d, 585 (Ind. 1980); *Nahmias v. Trustees of Indiana University*, 444 N.E.2d 1204 (Ind. 1983); *Carmichael v. Silbert*, 422 N.E.2d 1330 (Ind. 1981).

None of Petitioners' cases hold that the Fourteenth Amendment requires that a discovery rule be applied to a state tort statute of limitations.

To begin with, "low-level" or rational-basis judicial scrutiny is clearly the proper scope of judicial review of Petitioners' federal due process and equal protection challenges to IC 33-1-1.5-5. *American Pipe Const. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83, 88 n.32 (1978); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

Because Petitioners' constitutional challenges invoke this low level review, many of their cases are irrelevant. *Leary v. United States*, 395 U.S. 6 (1969), Petit. 9, concerned a fundamental constitutional right—the right to fairness in a criminal proceeding—and the Court thus applied strict scrutiny rather than the traditional level of judicial review.

Petitioners' reliance on *Cleveland Board of Education of LaFleur*, 414 U.S. 632 (1974), Petit. 9, is likewise misplaced. The School Board rule there invalidated was gender-based and the level of judicial scrutiny applied was accordingly stricter than would here be proper. *See, e.g., Mississippi University for Women v. Hogan*, ___ U.S. ___, 102 S.Ct. 3331, 3332 (1982).

Vlandis v. Cline, 412 U.S. 441 (1973), Petit. 9, is also distinguishable because the scope of judicial review there applied is different than that which is here proper. The *Vlandis* invalidated a Connecticut statute because less restrictive alternatives were available, *id.*, 412 U.S. at 451,

and because the statute did not always effectively make the distinction it was designed to make. *Id.*, 412 U.S. at 448. Such reasoning is clearly antithetical to the principle here controlling, i.e., that IC 33-1-1.5-5's "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 421 (1961).

Petitioners also cite a case in which a tax law was invalidated as unconstitutional. However, *Schlesinger v. Wisconsin*, 270 U.S. 230, (1926), Petit. 9, is, in this respect, "'plainly not good law today . . .'" *Sakol v. Commissioner*, 574 F.2d 694, 698 n.10 (2d Cir. 1978) (citation omitted), *cert. denied*, 439 U.S. 859 (1979).

Moreover, *Schlesinger* is inapposite. There invalidated was a tax statute which conclusively presumed that all gifts made within specified periods of the date of death were made "in contemplation of death" and thus had to be included in the donor-decedent's estate for tax purposes. What made such statute arbitrary and capricious was its utter disregard of the donor's actual intent. *Schlesinger, supra*, 230 U.S. at 239. No such legislative capriciousness inheres in IC 33-1-1.5-5.

Nor does *Martinez v. California, supra*, Petit. 11, require a discovery rule. In *Martinez*, this Court affirmed the dismissal, based on the California Tort Claims Act's provision of absolute tort immunity for the State's parole decisions, of a wrongful death claim brought against the State of California by the heirs of a decedent killed by a parolee. The heirs alleged that the State's employees were negligent in deciding to parole the murderer. Plaintiffs argued that the California rule violated due process.

The *Martinez* Court disagreed, upholding the statute because it rationally achieved California's purpose, i.e., enhancement of the State's parole program by eliminating any possible "chilling effect" of potential tort liability on the State agents involved in the parole decision-making process. This Court so held even though the statute's bar

was absolute in that there was *no* right to bring any wrongful death, personal injury or property damage claim against the State of California for negligently paroling someone.

Thus, under *Martinez*, Federal equal protection is not offended by a state statute which creates even an absolute bar to even an entire class of potential tort plaintiffs—there the class of persons allegedly injured by a negligently paroled California State prisoner; here the class of persons allegedly injured by products sold over ten years before suit—so long as such a statute rationally achieves a legitimate state purpose. Nor is Federal due process offended where there "'is a rational relationship between the state's purpose and the statute.'" *Martinez, supra*, 444 U.S. at 282 (quoting and "accepting" the California Supreme Court's decision being reviewed). That is clearly the case here.

C. IC 33-1-1.5-5 Rationally Achieves Indiana's Interests In Repose and Reliance.

One legitimate purpose of IC 33-1-1.5-5 and other statutes of limitations is to effectuate the policy of "reliance", the goal of which is "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.* * *" *Chase Securities Corp. v. Donaldson, supra*, U.S. at 314 (citation omitted).

The second proper purpose of a statute of limitations is to effectuate the policy of "repose", i.e., to protect a citizen from psychological and economic uncertainty: to provide a point in time when a citizen can "be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations." *Chase Securities Corp. v. Donaldson, supra*, 325 U.S. at 314.

Indiana's determination that a ten-year statute of repose effectuates Indiana's policies of reliance and repose is clearly rational.

A key principle of "rational-basis" limited review is that "a statutory discrimination will not be set aside if any set of facts reasonably may be conceived to justify it." *McGowan v. Maryland, supra*, 366 U.S. at 421. An obvious corollary to this principle is that, in reviewing a state legislature's decision as to where to draw the line between claims deemed too old to be fairly entertained, in light of the legislative policies of reliance and repose, and those deemed not too old for those policy goals to be vitiated by their litigation, the reviewing court must judge the legislature's decision "in light of the *broad class* of cases to which it applies. ..." *Hargraves v. Brackett Stripping Machine Co.*, 317 F.Supp. 676, 683 (E.D.Tenn. 1970) (emphasis added).

The broad class of all product liability cases governed by IC 33-1-1.5-5 includes cases based not only on asbestos-containing products and asbestos, but product liability cases involving automobiles, airplanes and virtually every other type of "product" imaginable.

Common experience teaches that it does not take ten years between the first sale of one of such a broad class of products and the litigation over its alleged defectiveness for memories of how that product was manufactured to "have faded," for "witnesses" to its manufacture to "have died or disappeared", or for "evidence" of its production to have "been lost." *See Chase Securities Corp., supra.*

It is hardly unreasonable for persons or companies to be granted the right to "plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability" for one of the many possible types of allegedly defective products when over ten years have elapsed since the first sale of that product. *See Johnson v. Star Machinery Co.*, 530 P.2d 53, 56 (Ore. 1974).

Petitioners erect a straw man to tear down as a purported demonstration that the ten-year repose period in IC 33-1-1.5-5 violates federal due process and equal protection. They assert that the Indiana Legislature decided on a ten-

year repose period based on its assessment of what constitutes the useful life of products. Petit. 9. Petitioners then claim that the statute is irrational because "there is no basis for asserting, as the statute asserts in its application, that asbestos is rendered less toxic by the passage of time." Petit. 9. Petitioners contend that because asbestos has a useful life in excess of ten years, the statute is irrational as applied to asbestos.

Petitioners' argument fails first because their premise—that the aim of IC 33-1-1.5-5's ten-year repose period is to establish the useful life of a product—is sheer speculation, as they *admit*. Petit. 7. This Court need not so lightly infer a legislative purpose. This Court has repeatedly held that the "*obvious* purpose [of a statute of limitations] is to encourage the prompt presentation of claims, * * *" *United States v. Kubrick*, *supra*, 444 U.S. at 117 (citations omitted; emphasis added), thereby effectuating "the legislative twin goals of (a) repose and (b) reliance that stale claims will not be tolerated in view of loss of memories, witnesses, or evidence." *Pitts*, *supra*, 712 F.2d at 281.

That such "obvious purpose" of statutes of limitation generally is indeed the purpose of IC 33-1-1.5-5 is clear from the statute's very terms: the statute's aim is not to define the "useful life of a product", a phrase not used in the statute, but is rather to define as untimely and thus bar "any product liability action" not "commenced" "within ten (10) years after the delivery of the product to the initial user or consumer. . . ." IC 33-1-1.5-5. As shown above, there can be no doubt that the twin legislative goals of repose and reliance are rationally achieved by the legislative decision to define as untimely (and thus bar) any action filed over ten years after the product's first sale.

Moreover, even if the Legislature's purpose in choosing a ten-year repose period was to define the "useful life" of products, Petitioners do not show that choice to be unreasonable. The Legislature's choice of the number of years for the "repose period" cannot be examined only as it

applies to asbestos or other allegedly toxic chemicals, but must be judged "in light of *the broad class* of cases to which it applies. . . ." *Hargraves v. Brackett Stripping Machine Co., supra,* 317 F.Supp. at 683 (emphasis added).

No doubt there are some, perhaps many, products which can be and are used for more than ten years.[11] Conversely, there are undoubtedly some, perhaps many, products destined for the junkyard in less than ten years, thus minimizing, if not eliminating, any risk of injury to the consumer before the ten years has passed. Such an assessment is clearly one for the Legislature, based on "legislative facts". Petitioners cannot here show that it is irrational for the Indiana Legislature to decide that most of the "broad class" of products are not in use after ten years.

D. Any Classification Created By IC 33-1-1.5-5 Is Constitutionally Permissible.

Petitioners assert that IC 33-1-1.5-5 creates two classes of tort plaintiffs based upon whether the plaintiffs have "slow injuries or fast injuries." Petit. 8. However, Petitioner fails to show how this asserted "classification" violates Fourteenth Amendment equal protection.

Moreover, the authorities set forth in the immediately preceding section of this Argument, which demonstrate that IC 33-1-1.5 does not violate Fourteenth Amendment due process, apply just as forcefully to equal protection analysis. No suspect classification is present; therefore, low-level rational-basis scrutiny is proper. IC 33-1-1.5-5's classification of potential tort claims by the length of the time period separating commencement of suit and delivery of the product to the initial user is clearly rationally related to the Indiana interests in repose and reliance.

Petitioners' equal protection argument was effectively

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[11] Asbestos may be such a product; however, there is no evidence in this record that it is. Petitioners' claims that asbestos is a "fiber which never wears out" and that "toxic chemicals do not wear out" (Petit. 9) are not supported by the record.

refuted in *Dague v. Piper Aircraft Corp.*, 513 F.Supp. 19, 24-25 (N.D.Inc. 1980), *aff'd*, Case No. 79-C-293 (7th Cir. 1981). Plaintiff Dague had argued, as do Petitioners here, that IC 33-1-1.5-5 improperly established an unreasonable classification between consumers injured by older products and those injured by newer products. The District Court rejected Dague's argument, holding that the ten-year cutoff time is not "arbitrary or unreasonable" and "to the extent that...consumer of older products are unprotected, such classification [is] reasonable and rational." *Id.*; *see also Pitts v. Unarco Industries, Inc.*, *supra*, 712 F.2d at 280-81; *Scalf v. Berkel, Inc.*, *supra*, 448 N.E.2d at 1205-06.

V. No Conflict Exists Among State and Federal Courts As to Any Federal Question.

Petitioners cite state court cases in which they contend statutes similar to IC 33-1-1.5-5 have been held to violate Fourteenth Amendment equal protection and/or due process. Petit. 6-7. Petitioners apparently hope to thereby create a conflict between such decisions of "state court[s] of last resort" and decisions of two "federal court[s] of appeals," i.e., the Seventh Circuit's decisions in *Braswell* and *Pitts* which rejected just such constitutional challenges to IC 33-1-1.5-5, and the Sixth Circuit's decision in *Mathis v. Eli Lilly & Co.*, 719 F.2d 134 (6th Cir. 1983), which rejected such challenges to Tennessee's ten-year product liability "statute of repose" in a DES case.

However, careful analysis of Petitioners' cases shows that none of them decided the *federal* questions which were presented in *Pitts*, *Braswell*, and *Mathis*. Each state court in Petitioners' cases held only that its respective state's product liability "statute of repose" violated such *state's*

constitution.[12] Petitioners' cases thus did not even decide "federal question[s]". S.C. Rule 17.1(b). Thus, there is *no* conflict between the decisions of the "state court[s] of last resort" cited by Petitioner and the "federal court[s] of appeals" decisions in *Pitts*, *Braswell* and *Mathis*.

V. Conclusion and Prayer.

Based upon the foregoing, the Petition should be denied.

Respectfully submitted,

DOUGLAS B. KING, Esq.
909 Merchants Plaza, East Tower
Indianapolis, Indiana 46204
Respondents' Counsel of Record

[12] The Court in *Kennedy v. Cumberland Engineering Co., Inc.*, 471 A.2d 195, 197, 201 (R.I. 1984), based its decision solely on R.I. CONST., art. I, sec. 5, and expressly declined to consider the federal constitutional question. The *Kennedy* Court also relied on most of Petitioners' other cases, *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983); *Battila v. Allis Chalmers Mfg. Co.*, 392 So.2d 874 (Fla. 1980), and *Overland Const. Co. v. Simmons*, 369 So.2d 572 (Fla. 1979); and *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996 (Ala. 1982), all of which the *Kennedy* Court recognized decided only State constitutional questions. *Kennedy*, *supra*, 471 A.2d at 200-01. Such Courts' own opinions demonstrate this: *Lankford*, *supra*, 416 So.2d at 999, 1004, relied on ALA. CONST., art. I, sec. 13; *Battila*, *supra*, 392 So. 2d at 874, and *Overland Const. Co.*, *supra*, 369 So.2d at 575, followed FLA. CONST., art. I, sec. 21; and *Heath*, *supra*, 464 A.2d at 291-92, 294-97, applied N.H. CONST., pt. I, arts. 14, 15. Petitioners acknowledge that their only other case, *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 284 S.E.2d 188, 192 (1981), *modified and aff'd*, 306 N.C. 364, 293 S.E.2d 415 (1982), considered only N.C. CONST., art. I, sec. 18.

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix Section	*Description*	*Record Reference*	*Appendix Page*
1.	Pages 254-58, 317 of the Transcript of the September 20, 1982 Deposition of Anthony Reed Dowell, M.D.	*Braswell* Record, D.C. Cause No. IP 79-996-C	1-5
2.	Cover Page and Pages 89-90 of Transcript of Consolidated Pre-Trial Conference of July 6, 1982, Vol. I	Pre-Trial Transcript, (All Cases)	6-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ORVIL T. BRASWELL, et al.,	)	NO. IP 79-996-C
HELEN MARIE IGO, et al.,	)	NO. IP 81-363-C
ROBERT E. GODFREY, et al.,	)	NO. IP 81-722-C
OBERT F. MOORE, et al.,	)	NO. IP 81-369-C
OMER T. ROGERS, et al.,	)	NO. IP 81-306-C
JAMES T. CLAPP, et al.,	)	NO. IP 81-162-C
THOMAS MUNCY, et al.,	)	NO. IP 81-1103-C
	)	
Plaintiffs	)	
	)	
-vs-	)	
	)	
GAF CORPORATION, et al.,	)	
	)	
Defendants.	)	

The deposition upon oral examination of ANTHONY REED DOWELL, M.D., a witness produced and sworn before me, James E. Shirey, Notary Public in and for the County of Hamilton, State of Indiana, taken on the 20th day of September, 1982, commencing at 6:15 P.M., at the office of the deponent, 3885 Wheeling Avenue, Muncie, Indiana.

[254]

EXAMINATION

QUESTIONS BY MR. KING:

124 Q Doctor, my name is Douglas King. I am going to ask you a few questions. I take it your reading has informed you that asbestos naturally appears as a fibrous mineral. Is that true?

A That's true.

125 Q How does the asbestos, which is a fibrous mineral, how does that in your opinion hurt people?

A My understanding is that the asbestos fiber is a fibrogenic mineral. By that I mean it stimulates the cells of the lung to form collagen or connective tissue, which tends to scar the lung parenchyma and interfere with its function as a gas exchange unit.

126 Q How is this ingested in someone that will cause this reaction that you have described?

A The problem with asbestosis of the lung is that the particles have to be inhaled and have to be deposited within the lung parenchyma and have to reside there long enough in order to generate this fibrogenic response.

127 Q But it's inhaled generally in the form of what we laymen would call a dust; is it not?

[255]

A Yes.

128 Q Is this a dust, then, you would consider to be fibrogenic?

A Yes, the dust being, the asbestos fibers would be fibrogenic in the host when inhaled and lodged within the lung tissue.

129 Q Okay. So it's my understanding, then, once the dust gets in someone's lungs through inhalation, it starts off this chain reaction that produces in some people a fibrotic reaction?

A Yes. That's my understanding.

130 Q Is it your understanding, then, that this tissue reaction occurs when the dust is inhaled?

A The tissue reaction apparently occurs in

different stages. The initial event is the deposition of the fiber in the tracheobronchial tree and if the fiber is small enough, it can be lodged in upstream segments in the distal or peripheral parts of the lung and there may be engulfed by cells known as macrophages. And it is my understanding that this engulfment by the macrophages or the cells of the lung can occur very quickly after the deposition of the particle within the lung itself. Once the particle is

[256]

ingested by the macrophage, a series of cellular events can take place, resulting in recruitment of other cells, a breakdown of cells known as cytotoxicity and the liberation of other chemicals, which generate the cells to increase protein synthesis or chemical production to lead to the inflammatory response.

The development of fibrosis, which in my mind means the production of collagen connective tissue, takes perhaps several weeks at least to begin to develop and in most cases the development of fibrosis is a chronic type of result in inflammation, which we are talking in terms of weeks to months to years.

131 Q I believe yesterday you used the term, "insult", in connection with the dust being inhaled in the beginning of this reaction. Can you tell me what you mean by that?

A The concept of insult in my definition would be the elicitation of the inflammatory response the particle makes when it's originally deposited within the lung. The insult can be an invasion of an area of the lung, which normally should be maintained free and clear of such pollutants,

and the insult being then the deposition of this potentially harmful or toxic product, which then

[257]

sends off a series of events leading to organ destruction or alteration.

132 Q And this insult then occurs when the dust containing the asbestos is inhaled?

A It's my understanding that the insult begins at the time the particle arrives in the tracheobronchial tree and at least some biochemical and cellular events are taking place at that particular point in time.

133 Q And the macrophage reaction that you described, it is theorized by some people that this is what develops into the fibrosis that you have described as asbestosis?

A Yes. Since the macrophage is the first cell to come in contact with the asbestos material, the ingestion of this material then sets off a series of reactions, which lead to the other cell recruitment and the generation of more inflammation.

134 Q You used the term, "toxic", I believe, in one of your last answers. What do you mean by that word "toxic"?

A I equate the term "toxic" with nocuous or harmful effect of the material on normal organ tissue.

135 Q And asbestos then has a toxic effect when inhaled as you have described it; is that your opinion?

[258]

A In regard to its toxicity, I would say that the

major problem or manifestation of toxicity would be the chronic inflammation or the chronic fibrotic change as opposed to an acute toxicity, which one might see with the inhalation of chlorine gas or ammonia gas.

136 Q So if I understand you correctly, the toxic effect, that is, the harmful effect of the asbestos begins to occur when it's inhaled?

A In my opinion, it's a matter of semantics as to when the actual process of inflammation begins. But as a point in fact, I would say that *the series of events leading to the final production of pulmonary fibrosis has to begin at the time the particles are deposited and engulfed by the cells in the lung.* [emphasis added]

* * *

[317] QUESTIONS BY MR. KING:

287 Q Doctor, you answered several questions of mine and later on you answered several questions of Messrs. Young and Kellam. Am I correct in thinking that it is your testimony that while the symptoms of asbestosis have a latency period, the biological mechanism, which starts that disease process, actually begins at the inspiration of the asbestos particles? Is that correct?

A It's my opinion that depending on how one—

MR. DREW YOUNG: Answer that yes or no, will you? That's really important. We have been wanting to know that.

A Can you repeat the question again?

(Question No. 287 was read back by the Reporter.)

A Yes.

288 Q Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ORVIL T. BRASWELL, et al.	)	IP 79-996-C
WILLIAM M. BAKER, et al.	)	IP 81-71-C
JAMES T. CLAPP, et al.	)	IP 81-162-C
OMER T. ROGERS, et al.	)	IP 81-306-C
HELEN M. IGO, et al.	)	IP 81-363-C
OBERT F. MOORE, et al.	)	IP 81-369-C
ROBERT E. GODFREY, et al.	)	IP 81-722-C
BOB MCGEE, et al.	)	IP 81-1092-C
HARRY ROSEBERRY, et al.	)	IP 81-1094-C
HUBERT MADDEN, et al.	)	IP 81-1099-C
THOMAS MUNCY, et al.	)	IP 81-1103-C
	)	
-v-	)	
	)	
JOHNS-MANVILLE SALES CORPORATION	)	
JOHNS-MANVILLE CORPORATION	)	
GAF CORPORATION	)	
RAYBESTOS-MANHATTAN, INC.	)	
THE FLINTKOTE CO.,	)	
THE CELOTEX CORPORATION	)	
ASBESTOS CORP. LIMITED	)	
BELL ASBESTOS MINES, LTD.	)	
CANADIAN JOHNS-MANVILLE CO., LTD.	)	
NATIONAL GYPSUM CO., INC.	)	
LAKE ASBESTOS OF QUEBEC, LTD.	)	
FLINTKOTE MINES, LTD.	)	

Before The
HON. CALE J. HOLDER

Vol. I

OFFICIAL REPORTER'S TRANSCRIPT OF PROCEEDINGS AT THE PRETRIAL CONFERENCE

Indianapolis, Indiana
July 6, 1982

[89]

THE COURT:

And, as has been predicted in prior cases, the plaintiff's position about has to be, in the law of Indiana, that the accrual date is that date when the injury occurred, plus knowledge of damages. You agree?

MR. ANDREW YOUNG: Absolutely.

THE COURT: Do the defendants agree to that?

MR. JAMES ROCAP: Yes, sir.

MR. KING: No, your Yonor.

THE COURT: How's tha'?

MR. KING: No, your Honor.

THE COURT: You don't agree with that?

MR. KING: I don't agree that is when the cause of action accrued.

[90]

THE COURT: When does it? When is the accrual date?

MR. KING: The date of the injury, regardless whether plaintiff knows the fact that he's been damaged.

THE COURT: I want you to take a look at a case that I got kicked in the rear on, partially.

What was the name of the fertilizer—Gahimer versus Virginia-Carolina [*Gahimer v. Virginia-Carolina Chemical Corp.*, 241 F.2d 836 (7th Cir. 1957]. The plaintiff was planting corn, and the fertilizer was bad. The

administratrix had the problem, and they noticed during the summer that corn was fading out in color, its leaves weren't maturing properly, had boils all over it—whatever it was, I forget now. It wasn't until September, at crop time or thereabouts, that they were able to tell they were going to be short a crop.

The Court said there has to be knowledge of damages.

You are not referring to that other case I had on drugs [*Withers v. Sterling Drug, Inc.*, 319 F. Supp. 878 (S.D. Ind. 1970)] where—

MR. KING: No, your Honor, I am not referring to that.

With all due respect, I am referring to the case of the Indiana Supreme Court that was decided, handed down after the Seventh Circuit decided Gaheimer [sic], Shideler versus Dwyer. In Shideler, the cause of action accrued when the injury occurs.

In the briefs supporting the motion for summary judgment which I have filed I treat that case as—